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Monthly Report

July/August 2010

SAVE THE DATE
October 28, 2010

VSNJ Annual Meeting - Highlawn Pavilion, West Orange, NJ

"EVAR at 20: Where We Are In The Next 5 Years"

with Frank Criado, MD, FACS, FSVM

Union Memorial-MedStar Health

Baltimore, MD

Legislative Update

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ACF TAX

On June 29, 2010, Governor Christie signed into law the Fiscal Year 2011 Appropriations Act, enacting a \$29.38 billion spending budget that leaves a \$300 million surplus. While this budget did not increase sales or income taxes, the ambulatory care facility ("ACF") community will chip in significantly more to the New Jersey State coffers due to an increase in the ACF Tax cap from \$200,000 to \$350,000. Earlier versions of the budget, eliminated the cap entirely, but efforts of the Alliance for Quality Care have successfully convinced the Governor not to remove the cap.

Since going into effect in 2004, the Department of Health and Senior Services has imposed an annual assessment on licensed ACFs that provide ambulatory care services, such as ambulatory surgery, computerized axial tomography, magnetic resonance imaging, megavoltage radiation oncology, positron emission tomography, comprehensive outpatient rehabilitation, extracorporeal shock wave lithotripsy, orthotripsy and sleep disorder services. N.J.S.A. 26:2H-18.57.

Prior to the enactment of this year's budget, an ACF with gross receipts above \$300,000 would be assessed at a rate of 2.95% multiplied by the ACF's gross receipts with a "cap" of \$200,000. That "cap" has now been raised to \$350,000, effective as of July 1, 2010. ACFs with gross receipts of less than \$300,000 will continue to be exempt from the assessment. Assessment monies collected are used to finance charity care at New Jersey hospitals.

Out-of-Network Update

As you know, out-of-network legislation has been introduced in each body of the Legislature with Assemblyman Schaer and Senator Gill leading the charge.

Over the past couple of months, Assemblyman Schaer has conducted three meetings with stakeholders from both the provider and insurance company communities. He plans to select a few representatives from each side and conduct further meetings/negotiations over the summer, with the idea of introducing new legislation in the fall.

In the Senate, Senator Gill held a hearing on her bills (one of which would criminalize the waiver of co-payments). While Senator Gill had indicated she wanted to get the bills out of committee, that did not happen. We are sure Senator Gill will revisit this issue in the fall when the Legislature comes back and will keep you updated with regard to any developments.

President Signs Bill Into Law Delaying Medicare Payment Cut Until November 30, 2010

On June 25, 2010, President Barack Obama signed into law H.R. 3962, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (the "Act"). The Act had been passed by the Senate on June 18, 2010 and was passed by the House on June 24, 2010. The Act not only delays the application of the 2010 Sustainable Growth Rate ("SGR") formula, which resulted in a temporary average 21.3% cut that went into effect on June 1, 2010, but also establishes a 2.2% update to the Medicare Physician Fee Schedule ("MPFS"). The Act's applicability is retroactive to June 1, 2010. The Centers for Medicare & Medicaid has instructed Medicare contractors to delay reprocessing the already processed claims and processing new claims until the new payment rates established by the Act can be loaded into the Medicare contractors' claims processing systems. Claims processing is expected to resume by July 1, 2010. Note that for claims that were submitted with charges greater than or equal to the 2.2% updated rates will automatically be reprocessed. However, any claims that were submitted with charges that are less than the 2.2% updated rates will only be corrected if the provider requests an adjustment. This is because Medicare claims are paid based on the lesser of the submitted charge or the MPFS amount and because submitted charges may only be altered upon the request of the provider submitting the charge.

By way of background, application of the 2010 SGR conversion factor results generally in a 21.3 % 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 21.3 % 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. On April 15, 2010, President Barack Obama signed legislation into law which delayed the application of the 2010 SGR conversion factor until June 1, 2010.

ONC Issues Final Rule Establishing Temporary Certification Program for EHR Technology

On June 18, 2010, the United States Department of Health & Human Services Office of the National Coordinator for Health Information Technology ("ONC") issued a final rule to establish a temporary certification program for electronic health record ("EHR") technology. The temporary certification program establishes processes that organizations will need to follow in order to be authorized by the ONC to test and

certify EHR technology. The final rule relating to establishment of the permanent certification program is expected to be published in the fall.

Because the use of "certified EHR technology" is a core requirement for providers who seek to qualify to receive incentive payments under the Centers for Medicare & Medicaid Services ("CMS") ERR Incentive Programs, the ONC believes that certification will provide assurance to purchasers and other users that an EHR system offers the necessary technological capability, functionality and security to help them meet the meaningful use criteria established by a given phase. The ONC will keep a list of certified software products on its website.

By way of background, on January 13, 2010, CMS published its interim final rule ("IFR") to implement the electronic health record ("EHR") incentive programs enacted under the American Recovery Reinvestment Act of 2009 (the "Act"). Under the Act, eligible professionals and hospitals may receive payments for implementing EHR systems. The IFR went into effect on February 12, 2010, with an opportunity for public comment and refinement until March 15, 2010.

New Developments Related to Horizon Blue Cross Blue Shield of New Jersey Settlement

In 2007, the New Jersey Superior Court (the "Court") approved a settlement between Horizon Blue Cross Blue Shield of New Jersey ("Horizon") and approximately 40,000 New Jersey physicians (the "Settlement"), Sutter v. Horizon, N.J. Super. Ct., L-3685-02. The Settlement was a result of a class action lawsuit filed in 2002 on behalf of the physicians against Horizon and three other New Jersey-based health plans.

Pursuant to the terms of the Settlement, the physicians will not receive any payments, nor is Horizon admitting to any wrongdoing. Some of the key elements of the Settlement include, but are not limited to:

- Fee schedules for common procedures are to be made available to participating physicians via CD-ROM or electronically.
- Participating physicians to be provided 90 days notice of material changes to Horizon's contracts, policies and procedures.
- Participating primary care physicians to be permitted to close their practices to new patients covered by Horizon.
- Most fees not to be reduced for participating physicians more than once per year.
- Overpayments not to be recovered after more than 18 months of the original payment.
- More notice and information must be provided regarding overpayments.
- Determinations of medical necessity not to be revoked absent evidence of fraud, material error or material change in the condition of the patient prior to service.

Brach Eichler initiated an action to oppose the Settlement at the request of the New Jersey Association of Ambulatory Surgical Centers, the American College of Emergency Physicians, the Radiological Society of New Jersey, the New Jersey Society of Pathologists, the New Jersey Association of Osteopathic Physicians and Surgeons, the Vascular Society of New Jersey, the New Jersey Academy of Ophthalmology, the New Jersey State Society of Anesthesiologists, and the Orthopaedic Surgeons of New Jersey. Brach Eichler filed an objection to the Settlement because we firmly believe that the Settlement does not provide any benefit to physicians in New Jersey since the terms of Settlement do no more than require Horizon to comply with its current contractual obligations and existing laws and regulations governing health benefit carriers. In

addition, Horizon is not required to make any payments to New Jersey physicians under this Settlement. At the same time, the attorneys representing the "class" submitted a fee application of \$6,500,000, none of which is to compensate New Jersey physicians. The fee application was approved by the Court. Brach Eichler moved for a stay of the fee award, which was denied. Thereafter, Brach Eichler appealed the Court's decision to approve the Settlement terms.

On March 25, 2009, Judge Parker, writing on behalf of the New Jersey Appellate Division, found that the Court abused its discretion in denying Brach Eichler's request for a testimonial hearing pursuant to N.J. Court Rule 4:32-2(e). As such, the matter was remanded to the Court for a testimonial fairness hearing. The Appellate Division additionally requested that the Court review and reconsider the reasonableness of utilizing a percentage recovery method in awarding \$6,500,000 in attorney fees. On June 15, 2010, Judge Stephen Bernstein of the Superior Court of New Jersey issued an opinion that determined that the terms of the Settlement were fair and in the best interest of the class. However, Judge Bernstein reduced the award to the plaintiffs' attorneys to \$3,683,002 in fees and \$619,292 for out-of-pocket expenses, for a total award of \$4,302,294. Judge Bernstein also awarded the Class Representative, John Sutter, M.D., \$15,000 for his work on behalf of the class.

Bill Introduced That Would Require Coverage at ASCs and Surgical Practices

On June 14, 2010, Herb Conaway, Jr. (D-7), Chair of the Assembly Health and Senior Services Committee, introduced Assembly Bill A-2882 (the "Bill") into the New Jersey State Assembly. The Bill, if passed into law, would require that health benefit plans include coverage for treatment at ambulatory surgical centers ("ASCs") and surgical practices and to provide those benefits to the same extent as provided at other licensed health care facilities. The Bill would also prohibit the Commissioner of the New Jersey Department of Banking and Insurance from approving amendments or riders that would limit or cap coverage for services provided at ASCs or surgical practices. The Bill has been referred to the Assembly Health and Senior Services Committee.

Asset Protection: Most common planning mistakes and oversights

The greatest common denominator among the different areas of asset protection is ownership: who owns what and how. Your choice of ownership is where most mistakes occur.

The most common types of ownership for your primary residence are Joint Tenancy with Right of Survivorship (JTWROS) and Tenants in Common (TIC). In the event of a lawsuit neither of these types of ownership would afford you much, if any, protection from creditors. The best option for your primary home is Tenants by the Entireties. This is a type of joint ownership that is only available for a husband and wife. Each spouse is protected from the creditors of the other. This type of ownership has become the default ownership when purchasing a home in NJ. So if you have purchased your home in the last 5 years or so you might already own your home this way.

The second best ownership option, and this is a distant second, is to own your home individually by the non-doctor spouse. Assuming that your spouse is not also in a career that is prone to lawsuits this strategy could work. However, individual ownership offers you no protection whatsoever if your spouse gets sued (car accident, etc.). If you choose this route I would strongly urge you to maximize your liability limits on your Auto, Home, and Umbrella policies.

Next month we will explore ownership asset protection strategies for your vacation home. If you have any questions or would like additional information please contact me at (877)972-7900 or dvargo@varbeco.com.

David J. Vargo, CFP®, CMFC
President, Varbeco Wealth Management, LLC

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.

Mark Your Calendar

October 28, 2010 - VSNJ Annual Meeting - Highlawn Pavilion, West Orange, NJ

December 4, 2010 - ACS-NJ 59th Annual Scientific Meeting

March 9, 2011- VSNJ 33rd Annual Meeting- Nanina's In The Park, Belleville, NJ