Capen Ignites An Imperfect Storm for Physician Owned Surgery Centers

By Hope Levy-Biehl

On September 19, 2007, the Court of Appeals for the Third District in California issued a decision in Capen v. Shewry, 155 Cal. App. 4th 378. In Capen, the court addressed whether Dr. Capen, a licensed physician, was required to obtain a license for a surgical clinic he was developing and in which non-owner physicians would practice. The court ultimately concluded that physician owned and operated surgical clinics are to be regulated by the Medical Board while surgical clinics operated by non-physicians are to be regulated by the Department of Public Health. As a result, the court determined that Dr. Capen’s surgical clinic was not subject to licensing and regulation by the California Department of Public Health (CDPH).

In response to the Capen decision, CDPH issued a memorandum to its District Office Managers and Supervisors on April 4, 2008. This memorandum was subsequently revised and reissued on May 15, 2008. In it, CDPH pronounced that the Capen decision “strips the Department of the authority to license or regulate a surgical clinic that have [sic] any degree of physician ownership.” It further states that CDPH cannot issue or renew a license for any surgical clinic that is partly owned by a physician. The Fee Development and Grant Management Unit (FDGMU) within CDPH Licensing and Certification will work with the district offices to determine whether a surgical clinic can be licensed.

According to the memorandum, CDPH will consider whether a surgical clinic has physician ownership at the time an initial application is submitted, or when a license renewal is submitted. If either the licensure or renewal application indicates that the center has any degree of physician ownership, CDPH will not issue a license to the center or renew an existing license. Because the Capen decision does not define what constitutes “physician ownership” of a surgical clinic, CDPH has interpreted the case to take away its authority to issue a license to a surgical clinic that has any physician ownership at all. According to Belinda Whitsett, an attorney for CDPH, CDPH reads the Capen decision as creating an exemption from licensure for surgical clinics with any physician ownership. As a result, from CDPH’s perspective, a surgical clinic can be operated without a license from CDPH if the clinic has at least some physician ownership.

Separate and apart from the Capen decision, ambulatory surgery centers do not clearly qualify for the exemption from clinic licensure under California Health and Safety Code Section 1204(b)(1), or under the clinic license exemption under Health and Safety Code Section 1206(a). However, in light of CDPH’s position that it has no jurisdiction to license surgery clinics with any physician ownership, it appears that these clinics may continue to operate as long as they meet the requirements for...
operation of an outpatient setting under Health and Safety Code Section 1248.1. Under that section, an unlicensed ambulatory surgery center may operate if it is either certified to participate in Medicare or accredited by an agency approved by the Division of Licensing of the California Medical Board.

Although CDPH will not renew or grant a license to a surgical clinic with any degree of physician ownership, it will continue to certify these centers for Medicare purposes. So, for example, when an initial licensure application is denied for a surgical clinic with some degree of physician ownership, the applicant will be given the opportunity to modify its request to be a “certified only” ASC. When an applicant applies for initial Medicare certification as an ambulatory surgery center, the CDPH district office will first refer the applicant to a CMS approved accrediting organization with deemed authority. Only if the applicant declines this option and if CMS approves the initial survey as necessary to ensure there is proper access to care will CDPH conduct the initial certification survey.

In addition to impacting the licensure status of a surgical clinic with physician ownership, CDPH’s interpretation of the Capen decision has had other significant ramifications. For example, historically the California State Board of Pharmacy has not issued a clinic permit to an ambulatory surgery center that is not licensed by CDPH, because it believed that such clinics were not exempt from licensure. Although CDPH has taken the position that as a result of the Capen decision, because it does not have the authority to license physician owned surgery centers, that these centers are in essence exempt from licensure, the Board of Pharmacy has not yet accepted this position. As a result, neither new clinic permit applications nor applications for the change of ownership of an entity that holds an existing clinic permit issued by the California Board of Pharmacy are currently being processed.

Although the Medicare and Medi-Cal programs have indicated that they will continue to certify surgical clinics with physicians owners that are not licensed by CDPH, it is possible that there may be other payment consequences for physician owned surgical clinics that are unable to obtain or maintain a license from CDPH, including, for example, relating to payment by third party payors.

Although many of the key players in this conundrum, including CDPH and the California Ambulatory Surgery Association were hoping for a legislative response to the Capen decision, there is no pending legislation on the horizon this session. It does not appear that this issue will be resolved by the legislature any time soon.

For more information on the Capen decision and its impact on surgery center licensure and certification issues, please contact Hope Levy-Biehl or David Henninger in Los Angeles at (310) 551-8111; Cary Miller in San Diego at 619.744.7300; or Steve Phillips in San Francisco at 415.875.8500.

Hope Levy-Biehl has been named as a Rising Star in Health Law in the latest issue of LA Magazine. Attorneys are selected through a polling process conducted by Law & Politics. Her practice includes health care reimbursement, as well as regulatory compliance, licensure and certification, payment and operational issues. She advises clients on various healthcare fraud and abuse matters, including self-referral laws, anti-kickback laws and requirements of the California Board of Medicine.
Hooper, Lundy & Bookman, Inc., has once again been named one of the top three health care law firms in California and one of the leading health care law firms in the country, according to the latest edition of Chambers USA. The directory is published by the prestigious Chambers & Partners, which produces law firm directories of top-rated law firms throughout the United States and Europe, ranking law firms primarily based on outside interviews with General Counsel, high-profile entrepreneurs and other significant purchasers of legal services. In addition to the firm ranking, five HLB attorneys were recognized as top performers in the state for the third year in a row.

Following is the text of the firm’s profile, reprinted with permission of Chambers & Partners, USA. We thank all of our clients and friends who contributed to the Chambers review.

The Firm: “Hooper Lundy & Bookman has a real depth of experience, understanding and expertise across the complete range of health care matters, in particular with regard to complex Medicare and Medicaid reimbursement issues,” clients say of this boutique health care firm. From its three California offices in San Diego, San Francisco and Los Angeles, the group devotes its time to advising healthcare providers in 46 states. The team covers all matters of concern across the healthcare industry, from business transactions to regulatory and litigation matters. On the regulatory side, a highlight was the team’s representation of the California Hospital Association and a number of member hospitals in appealing the Medicare Reimbursement Audit Contractor reviews for inpatient rehabilitation services.

The Lawyers: The “exceptional” Lloyd Bookman represents healthcare providers in transactional matters and is described as “a mastermind in Medicaid and Medicare reimbursement,” as well as representing clients in compliance matters. Clients praised him for “being on top of all the legal issues.” Top-ranked Patric Hooper brings long-standing experience to the table and is a recognized leader in the healthcare field. He has particular expertise in reimbursement matters and is “a respected litigator in California.” He also represents clients in fraud and abuse matters, and is described as “an amazingly knowledgeable and focused individual.” The “excellent and conscientious” Robert Lundy concentrates his practice on all matters related to healthcare business transactions. Clients praise “his intelligent and focused approach to his work.” Bradley Tully advises clients on regulatory matters and business transactions in the healthcare sector. Interviewees note that “with two decades of experience, he really knows what he is talking about,” adding that “he has a deep knowledge of the healthcare sector and its associated issues.” John Hellow continues to impress clients and peers for his Medicare and Medicaid reimbursement work, “in which he is experienced and respected.”

Clients/Work Highlights: The group represents the California Hospital Association and the California Medical Association in a class action complaint against Blue Cross California. On the transactional side, the firm represented a number of the purchasers in several transactions following Tenet Healthcare’s recent divestiture of many of its hospitals across California.
C A L E N D A R

June 3, 17, 18  CHA Annual Reimbursement Seminar, Oakland, Newport Beach, Pasadena. HLB Attorneys Lloyd Bookman, Patric Hooper, John Hellow, Byron Gross, Hope Levy-Biehl are lead faculty, covering Medi-Cal, Medi-Care, False Claims Act, RACs and more.

June 12  ABA 7th Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement, Washington, D.C. Patric Hooper is a panelist for Recent Developments in Damages and Penalties.

July 24  HFMA Meeting, San Diego. Felicia Sze and Jordan Keville speak on Hospital Reimbursement.

July 28  Quality Care Health Foundation & California Association of Health Facilities Summer Conference, Embassy Suites Resort, South Lake Tahoe. Mark Reagan presents Medicare Update - A Look in the Fiscal Crystal Ball.

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