Third Circuit Overturns Dismissal of Whistleblower Action: Ensure That Physician-Hospital Written Agreements Are In Effect

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On January 21, 2009, the U.S. Court of Appeals for the Third Circuit overturned the dismissal of a whistleblower action filed under the False Claims Act challenging an arrangement between an anesthesiology group and a hospital. *United States ex rel. Kosenske v. Carlisle HMA, Inc. and Health Management Associates, Inc.*, No. 07-4616 (3d Cir.). The Court found that the arrangement did not meet the personal services exception under the Stark and anti-kickback laws.

In 1992, Blue Mountain Anesthesia Associates PC, an anesthesiology group, entered into a written contract with Carlisle Hospital and Health Services ("CHHS"), giving the group the exclusive right to provide anesthesiology services at the hospital. CHHS agreed to provide office space, supplies, equipment and personnel for the group's use when providing anesthesiology services to patients. Pain management services were also referenced in the agreement; although in 1992, no pain management services were actually being provided.

In 1998, CHHS built a new standalone facility containing an outpatient ambulatory surgical center and a pain clinic, located about three miles from the hospital. The anesthesiology group was given rent-free space and equipment in the pain clinic and support personnel at no charge. The group provided physicians to see patients at the pain clinic. The 1992 agreement was not amended to include this additional facility, and no new agreement was entered into between CHHS and Blue Mountain. In 2001, Carlisle HMA, Inc. purchased the hospital, surgery center and other assets from CHHS; however, CHHS did not execute a formal written assignment of its contractual rights and obligations under the 1992 agreement. Nonetheless, after the sale, Carlisle HMA and the anesthesiology group conducted their business relationship as if the agreement remained in effect. Both entities submitted claims directly to Medicare for their respective costs.

Dr. Ted D. Kosenske, a former anesthesiologist with the Blue Mountain anesthesiology group, filed the False Claims Act lawsuit. He was associated with the group until 2005, when he left to open an independent pain management practice, which actively competed with Carlisle HMA's pain management clinic. Kosenske alleged that Carlisle HMA was non-compliant with the Stark and anti-kickback laws, even though when submitting its claims for facilities costs to Medicare it had certified that it was in compliance. Dr. Kosenske contended that this alleged incorrect certification made each claim false.

The Stark and anti-kickback laws prohibit a healthcare provider from giving physicians any form of compensation to induce them to refer patients to the provider. Stark applies only to certain designated health services, including hospital inpatient and outpatient services.

Regulations under the Stark and anti-kickback laws recognize that certain business relationships between physicians and healthcare entities are cost-effective and beneficial to patient care and include exceptions permitting physicians to make referrals in those circumstances. 42 C.F.R. § 411.357(d) creates a Stark exception for personal services arrangements between a physician and an entity, such as a hospital, provided that various requirements are met, including that the duties and compensation arrangement be clearly set out in a written agreement signed by the parties.

In November 2007, the district court dismissed Kosenske's claims, finding that the relationship between the anesthesiology group and the hospital, as described in the written 1992 agreement, extended to the relationship at the pain clinic and complied with the personal services exception to Stark (and the similar anti-kickback safe harbor).

The Third Circuit reversed the lower court's decision, making several important holdings. First, the Third Circuit confirmed that falsely certifying compliance with the Stark or anti-kickback laws is actionable under the False Claims Act. Second, the anesthesiology group's receipt of office space, medical equipment and personnel at no charge from the hospital was a compensation arrangement under Stark. Third, no written agreement covered the pain management relationship because the pain clinic was substantively different from inpatient anesthesia services addressed by the 1992 agreement. Fourth, even if the 1992 written agreement were construed to apply to the later situation, the Court held, the Agreement said nothing about the free office space, equipment and staff provided at the pain clinic, so the agreement did not specify the compensation to be paid over the term of the arrangement, as required by the exception. Finally, the hospital did not sustain its burden of showing that the compensation was the fair market value of the services being provided at the pain clinic, which is another requirement of the exception. The Court explained that fair market value is the price resulting from bona fide bargaining between buyers and sellers "who are not otherwise in a position to generate business for the other party." Thus, as a legal matter, "a negotiated agreement between interested parties does not reflect fair market value." The case was sent back to the district court for further proceedings under the False Claims Act.

The Court noted that although arrangements between anesthesiologists and hospitals typically do not raise Stark or anti-kickback concerns because anesthesiologists do not refer patients to the hospital, physicians seeing patients in a pain management clinic may refer patients to the hospital for tests or procedures. Therefore, those relationships may be subject to greater scrutiny.

This case demonstrates that today's business partner may be tomorrow's whistleblower. More importantly, it establishes that hospital-physician relationships should be thoroughly documented in writing to comply with the provisions of the applicable Stark exception or anti-kickback safe harbor. If the relationship was previously documented in writing, but has since changed, healthcare providers may want to update that documentation to avoid becoming a defendant in a False Claims Act case.

For Further Information

If you have any questions regarding this topic, please contact Philip H. Lebowitz or any other member of the Health Law Practice Group or the attorney in the firm with whom you are regularly in contact.