# District Court Allows Trial on Whether a Below Cost but Competitively Bid Arrangement Can Lead to a Kickback Violation

By Karen S. Lovitch on February 16th, 2012

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The recent decision by a federal court judge in Mississippi to deny defendants' motion for summary judgment in *United States ex rel. Jamison v. McKesson* rejected a well-established defense to claims that competitively procured arrangements for goods and services constituted "remuneration" for purposes of the Anti-Kickback Statute ("AKS"). Where it has been alleged that providers violated the AKS by offering discounted goods or services in exchange for Medicare or Medicaid referrals, providers can ordinarily establish that they did not violate the AKS by showing that the purported discounts reflected fair market value for the goods or services provided and thus did not constitute remuneration under the AKS. But the decision in *Jamison* is allowing the government to proceed to trial on its theory that the arrangement at issue, which was the result of a competitive RFP process, was not fair market value because the reimbursement rate was below the cost of providing the services. By shifting the focus of the fair market value inquiry from competitive market forces to the cost of services provided, this decision potentially signals risks for providers and payors concerning private contracts negotiated in highly competitive markets.

The claims in *Jamison* arise from arrangements between MediNet, a subsidiary of McKesson Corp., and nursing home operator Beverly Enterprises. Plaintiffs allege that MediNet provided remuneration to Beverly in the form of below-market billing services, purportedly in exchange for a contract for McKesson to supply enteral nutrition products to residents of Beverly nursing homes. This arrangement allegedly violated the AKS, thereby making claims submitted for the enteral nutrition products, which were reimbursed through Medicare, "false claims" for purposes of the False Claims Act ("FCA").

Evidence adduced in discovery established that the billing contract between MediNet and Beverly was awarded through a competitive RFP process. Defendants moved for summary judgment on the ground that procurement through a competitive bid established that the billing contract was at fair market value and thus could not constitute remuneration under the AKS. Although the court did not characterize it as such, the government's response was a "corrupt market" theory, alleging that the bidders were incentivized to bid the billing contract at below-cost rates in order to get the follow-on Medicare business from Beverly. The court, without any detailed factual analysis or citation to authority, concluded that the evidence cited by the government was enough to create a triable issue of fact on the question of remuneration.

The decision in *Jamison* is a bit of an outlier. Courts that have addressed the question of whether reimbursement rates are at fair market value have focused not on cost, but instead on whether prices are consistent with competitive market conditions. *See, e.g., Klaczak v. Consolidated Med. Transp.,*

458 F. Supp. 2d. 622, 678-79 (N.D. Ill. 2006) ("Firms cannot establish prices by fiat, at least not in a competitive industry. This is why fair market value, 'the price a willing buyer would pay a willing seller . . . when neither is under compulsion to buy or sell,' is the widely accepted metric of value.") (citing *United States v. Draves,* 103 F.3d 1328, 1332 (7th Cir.1997)); s*ee also United States v. Ctr. for Diagnostic Imaging, Inc.*, No. C05-0058RSL, 2011 U.S. Dist. LEXIS 40459, at *25 (W.D. Wash. Apr. 4, 2011); *United States ex rel. Perales v. St. Margaret's Hosp.*, 243 F. Supp. 2d 843 (C.D. Ill. 2003). Nonetheless, *Jamison* evidences the government's continuing effort to redefine the concept of fair market value based on the cost of goods or services provided, rather than on competitive forces in the marketplace. If other courts accept the invitation to redefine fair market value based on cost, providers and payors alike could run the risk that entering into contracts that result in thin or negative margins for the provider could expose the parties to FCA liability.