



Medicaid Takes The Spotlight in DOJ Stark Law Case

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Hospitals and physicians rarely enter into a referral relationship involving Medicare patients without first considering the Stark law, but until recently, the government's enforcement efforts largely ignored Medicaid. Now, however, Medicaid is in the spotlight. The Department of Justice (DOJ) is testing the applicability of the Stark law to Medicaid in a federal case in Florida. If the DOJ succeeds with its argument, the federal government may look to the Medicaid program to recoup federal funds. Meanwhile, the Center for Medicaid and Medicare Services (CMS) has confirmed that it considers the Stark law to be applicable to Medicaid as well as Medicare.

The Stark law prohibits physicians from referring patients, for certain services, to an entity with which the physician, or an immediate family member, has a financial relationship. The Stark law is a "strict liability" statute. That is, a provider faces liability under Stark regardless of intent, and the federal government has emphasized healthcare fraud and abuse enforcement over the last several years. In 2012, the federal government recouped a reported \$3 billion from healthcare fraud and abuse lawsuits. The application of Stark law to Medicaid claims would open a new avenue for the federal government to recoup federal funds and expose providers to greater liability.

The major difference between Medicare and Medicaid, however, is the involvement of the states. In the Medicare program, the money flows directly from the federal government to the providers. The Medicaid program, however, is partially funded by the states. The states pay the providers and then receive federal matching funds from the federal government. Since the federal government does not directly pay the providers, the federal government would have to recoup the money from the states rather than the providers. In 1993, CMS published proposed rules to withhold federal matching funds from a state for any transaction violating Stark, but CMS never finalized or implemented these rules. Some experts pointed to the complicated reimbursement mechanism as the reason that the federal government did not finalize a means for recouping these dollars.

This is a new area of exposure for Medicaid providers, which could be open to Stark liability in ways they do not expect. For many providers, who serve both Medicare and Medicaid patients, Stark compliance will not be a new endeavor. Nevertheless, the current uncertainty surrounding the Stark law's application to Medicaid presents two major concerns. First, there is not currently a federal mechanism in the Medicaid program that allows providers to disclose Stark non-compliance and negotiate potential liability, like there is in the Medicare program. Second, providers do not even know, at this point, whether they should be disclosing these liabilities. Providers and their attorneys will be watching the DOJ and CMS closely over the next several months for a resolution to this question.