Third Circuit Analyzes Stark Law Allegations Brought in a Whistleblower Case

Email Alert

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On January 21, 2009, the Third Circuit Court of Appeals issued an opinion in *U.S. ex rel. Kosenske v. Carlisle HMA, et al.*, which reversed summary judgment in favor of the defendants and permitted a qui tam case under the False Claims Act (FCA) to move forward. The case is noteworthy because it is one of the first appellate decisions analyzing Stark Law allegations and highlights how courts may apply Stark to common arrangements in the healthcare industry.

The qui tam relator in *Carlisle* was one of four doctors in an anesthesiology group. In 1992, the group negotiated and obtained an exclusive anesthesiology services agreement with the defendant hospital system. Although the agreement required the group to provide anesthesiology services, it also contemplated the group's performance of pain management services. Pursuant to the agreement, the group agreed to provide anesthesia coverage for the hospital's patients, and, in return, the hospital agreed to provide free space, equipment, and supplies. Additionally, the hospital agreed to give the group the exclusive right to provide anesthesiology and pain management services at the hospital. Finally, while the group agreed not to practice anesthesia or pain management at any location other than the hospital and any of its affiliated locations, several provisions in the agreement confirmed that the group's commitment under the agreement was limited to the hospital's location.

In 1993, the qui tam relator began administering pain management services, in addition to anesthesiology services, at the hospital's location. In 1998, the hospital built a stand-alone ambulatory surgical center and pain clinic at a location three miles away, and the group began to provide exclusive pain management services at the clinic. While the pain clinic was free-standing, neither it nor the ambulatory surgical center was a separately incorporated legal entity. The defendants argued that the pain management services provided by the qui tam relator and his provider group at the pain clinic were provided pursuant to the 1992 agreement, even though the agreement was never amended to expressly include services at the pain clinic.

In 2005, the qui tam relator left his group to open an independent pain management practice that competed with his old provider group and suffered from the exclusivity clause in the 1992 agreement. Indeed, the qui tam relator sought to unwind the arrangement between his old provider group and the hospital by filing a claim against the hospital under the FCA. In his claim, he alleged that his former practice group had a financial relationship with the hospital and its pain clinic because the hospital did not charge the group for office space, supplies, equipment, or personnel at the pain clinic. Presumably, the hospital received referrals from the group because it submitted claims to Medicare for facility costs and technical services rendered at the pain clinic. Additionally, the qui tam relator alleged that the hospital provided the free office space, supplies, equipment, and personnel in return for the referrals from the provider group. Thus, he alleged the hospital submitted false claims for the facility and technical services because the claims resulted from an arrangement that violated the Stark Law and Anti-Kickback Statute.

The district court held on summary judgment that the arrangement complied with the personal services exception because (1) the 1992 agreement sufficiently covered the performance and scope of pain management services, (2) the pain management services were reasonable and necessary, (3) the term of the 1992 agreement exceeded one year, and (4) the remuneration provided by the hospital constituted the fair market value of the pain management services because the agreement provided for mutual rights and responsibilities, and was negotiated at arms-length.

The Third Circuit reversed the district court's decision. It first held that the 1992 agreement did not sufficiently cover the pain management services performed at the pain clinic. The pain clinic was free-standing, it reasoned, and the 1992 agreement covered only those services performed at the hospital's location. The Third Circuit also held that because the pain clinic did not exist at the time of the 1992 agreement, the arms-length negotiations of the agreement did not prima facie establish the fair market value of the remuneration provided for the services at the pain clinic. As such, the Third Circuit remanded the case to the district court.

Are there any lessons to be learned from *Carlisle*?

- As expected, courts likely will apply a strict interpretation of Stark. The Third Circuit in this case strictly applied the writing requirement in Stark's personal service arrangements exception. Instead of broadly construing the parties' 1992 agreement to include services performed at the pain clinic, the Third Circuit required unambiguous inclusion of the services and other arrangements involving the clinic. It is worth noting that, notwithstanding a strict interpretation of Stark, the Court acknowledged that it did not reach the FCA's scienter requirement, which requires a "knowing" violation of Stark.
- Healthcare providers should be as specific and complete as possible in documenting their financial relationships with physicians. Providers should carefully identify and document all financial relationships with physicians. As those relationships evolve, providers should either amend the existing contract or enter into a new contract to specifically address the changed arrangement.
- Exclusivity rights and use of office space, equipment, and personnel may be viewed as remuneration under Stark, and the determination of whether such remuneration is consistent with fair market value will likely not be decided at summary judgment. Accordingly, providers should contemporaneously document evidence supporting the arrangement's fair market value.
- Competitors may use the FCA and Stark's broad application to their strategic advantage. Probably the most troubling aspect of *Carlisle* is the fact that the qui tam plaintiff, who once benefited from the arrangement in question, brought the case in order to compete with his former partners. While the district court has yet to analyze the remaining elements of the FCA, cases like *Carlisle* underscore the various avenues of potential FCA-based Stark litigation against healthcare providers.

A copy of *Carlisle* is posted in the Practice Corner on the Fraud and Abuse Practice Group's website.

**We would like to thank Enforcement Committee members Mark Bonanno, Esquire (Law Offices of Mark A. Bonanno LLC, Portland, OR) and Angela Wang, Esquire (O'Melveny & Myers LLP, Los Angeles, CA) for writing this alert, and David Deaton, Esquire (O'Melveny & Myers LLP, Los Angeles, CA) for reviewing it.*

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