

PHYSICIAN BONUS STRUCTURE HELD TO VIOLATE THE STARK LAW

EXECUTIVE SUMMARY

Earlier this month, the U.S. District Court for the Middle District of Florida held that the bonus compensation arrangements between a Florida hospital ("Hospital") and its employed medical oncologists violated the Stark Law. The Court concluded that the Hospital's bonus pool methodology, which included chemotherapy revenues, did not satisfy the requirements of the Stark Law's bona fide employment exception. The Court held that the bonus pools took into account the volume or value of the oncologists' referrals of designated health services ("DHS").

THE LAWSUIT

The Court's order was issued in connection with a *qui tam* case that was initially filed in June 2009 under the whistleblower provisions of the False Claims Act ("FCA"). In October 2011, the government intervened, alleging that the Hospital entered into various compensation agreements with its employed physicians that violated the Stark Law and that the claims submitted as a result of referrals from the employed physicians violated the FCA. The government filed a motion for partial summary judgment on the alleged Stark Law violations.

STARK ANALYSIS

In its motion for summary judgment, the government alleged that the Hospital violated the Stark Law and the FCA between 2005 and 2008 when it entered into incentive bonus arrangements with six of its employed oncologists. Under the bonus arrangements, the oncologists were paid from a bonus pool consisting of 15% of the operating margin (essentially the profit margin) of the Hospital's medical oncology program. The pool included revenues from outpatient medical oncology services, physician services and related outpatient oncology pharmacy charges. In other words, a portion of the revenues included in the pool derived from the employed oncologists' referrals of DHS to the Hospital. When determining the actual bonus amounts, the Hospital divided up the pool among the oncologists according to their relative personal productivity.

In response, the Hospital argued that the bonus arrangements did not violate the Stark Law because they fit within its statutory exception for bona fide employment relationships. The Hospital noted that the employment exception provides that "remuneration not be determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician." However, the Hospital pointed to the final sentence in the exception that permits payments of remuneration in the form of productivity bonuses based on services personally performed by the physician. The Hospital argued that because the bonus pool was divided up based on each oncologist's personally performed services, it should be able to rely on the bona fide employment exception, notwithstanding the fact that the pool from which each physician's bonus derived encompassed revenues attributable to the physicians' referrals of DHS to the Hospital (e.g., chemotherapy administration, outpatient chemotherapy drugs, etc.).

The Court rejected the Hospital's reasoning and focused on the important distinction between the oncology bonuses, which were divided up based on personally performed services, and the language in the employment exception, which permits productivity bonuses based on services that are personally performed. Although the pool was divided up based on services personally performed, the Court found the pool was "based on factors in addition to personally performed services - including revenue from referrals made by the medical oncologists for designated health services."

The Court explained that the fact that each oncologist could increase his or her share of the pool by personally performing more services was not enough to bring the oncology bonuses into the bona fide employment exception because the size of the pool (and thus the size of each oncologist's bonus) could be increased by making more referrals of DHS.

Although the Court ruled in favor of the government on the Stark Law violation, it stopped short of awarding summary judgment on damages, in part because it was unable to verify the government's \$27 million damages figure for harm to the Medicare program. The Court also noted that material issues of fact precluded it from determining that the Hospital acted "knowingly" in violation of the FCA. The Court's ruling leaves these issues to be resolved by the jury trial, which is scheduled for March 2014.

PRACTICAL TAKEAWAYS

The Court's ruling in this case reaffirms the view that health care entities should be cautious when entering into "team-based" or "pooling" compensation arrangements with referring physicians because they may implicate the Stark Law if the bonus pools are based on revenues derived from DHS. Pooling arrangements should be carefully structured to ensure that compensation is fair market value and that referrals of DHS are excluded from calculating the compensation pool. Any pooling arrangements should be examined to ensure they are structured and implemented in a manner that aligns with an applicable Stark Law exception (e.g., the in-office ancillary services exception or employment exception, etc.) to minimize the risk of a Stark Law violation.

If you have any questions or would like additional information about this topic or about hospital-physician compensation strategies, please contact:

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