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## Recent Third Circuit Case Reshapes Stark Analysis of Fair Market Value for Hospital-Based Contracts

The United States Court of Appeals for the Third Circuit recently engaged in a notably detailed analysis under the federal Physician Self-Referral Law, 42 U.S.C. § 1395nn (the “Stark Law”) and held that an arrangement between an anesthesiology group, Blue Mountain Anesthesia Associates (“Group”), and a hospital, HMA (“Hospital”), did not meet the requirements of the personal services exception under the Stark Law. In so holding, the Third Circuit found that (a) the parties did not have a current written agreement covering remuneration for all items and services provided and (b) the fact that the parties had negotiated its terms was not enough to satisfy the “fair market value” (“FMV”) standard under Stark. This case, coupled with the elimination of the FMV safe harbor in Phase III of the Stark regulations promulgated in September 2007, highlights the importance of providers ensuring that their arrangements reflect FMV and having adequate documentation to support the valuation.

In *United States ex rel. Kosenske v. Carlisle HMA, Inc. et al.* (3<sup>rd</sup> Cir. 2009), an anesthesiologist whistleblower, Ted D. Kosenske, M.D., alleged that the Hospital defendants violated the federal False Claims Act by falsely certifying that the submission of certain Medicare claims complied with the Stark Law and the federal Anti-Kickback statute, 42 U.S.C. § 1320-7b.<sup>1</sup> The United States District Court for the Middle District of Pennsylvania initially granted summary judgment to the Hospital and its parent company, and the Third Circuit decision reversed and remanded the district court decision.

### Factual Background

In 1992, the Group entered into a written agreement with the Hospital’s prior owner to provide full-time anesthesiology services at the Hospital on an exclusive basis (“Agreement”). Under the Agreement, the Hospital provided the space, equipment, and supplies reasonably necessary for the Group to provide the anesthesiology services. Although the Group was not providing pain management services at the time, the Agreement contemplated that pain management services may be offered in the future and stated that the Group would have the opportunity to provide those services under the same terms and conditions as provided in the Agreement.

<sup>1</sup> Although at the suggestion of the parties, the Third Circuit mistakenly suggests that the analysis under both the Stark Law and the Anti-Kickback statute are substantially identical and chooses not to engage in a kickback analysis. Unlike the Stark II Law, the Anti-Kickback statute is a criminal statute and in turn intent based. As such, remuneration to a referral source should only be subject to liability if the requisite intent to induce such referrals is present. Moreover, while the personal services exception under Stark and the personal services safe harbor under the Anti-Kickback statute are facially similar, there are certain key, material differences.

Fifteen months after the Agreement was signed, Dr. Kosenske began to provide certain pain management services to patients at the Hospital, and in 1998, the Group began to provide pain management services at the Hospital's freestanding facility which contained a pain clinic. The Hospital provided the Group with the use of space, equipment and support personnel at the pain clinic with no additional charge. At all times, the Hospital and Group separately billed and collected for the technical and professional components of both anesthesia and pain management services. In 2001, HMA bought the hospital from its prior owner, but the Agreement was not assigned to HMA. Nonetheless, the court acknowledges that both parties continued to operate as if the Agreement were still in effect.

### Court Findings

In originally finding that the Hospital was entitled to summary judgment, the district court found that while the Stark Law was implicated by the relationship between the Hospital and the Group, the arrangement met the scope of the personal services exception, by "tacitly assuming" that the pain management services were included within the scope of services covered by the 1992 Agreement.<sup>2</sup> In establishing that the parties met the fair market value requirement, the district court relied on the fact that the consideration provided for in the Agreement was negotiated by "unrelated parties." The Third Circuit agreed that the Stark Law was implicated, finding remuneration to the Group in the exclusivity of the arrangement and the use of space, equipment and personnel. However, the court of appeals rejected the district court's assessment regarding the Hospital's compliance with Stark and held that the arrangement did not meet the personal services exception based on:

the lack of a current written agreement, as the court found that the Agreement was not intended to cover services at a facility separate from the hospital, nor

<sup>2</sup> It is not clear why the personal services exception was the Stark exception analyzed. Given that this arrangement was before the "stand in the shoes" rules, the relationship appears indirect at most and may not in any event have met the definition of an indirect compensation relationship under Stark, which may have made a material difference in the legal analysis. Nevertheless, given the recent "stand in the shoes" changes, the analysis of this arrangement as direct may be helpful.

did it contemplate the provision of space, equipment and personnel devoted solely to pain management services; and a finding that the fair market value of the arrangement was not established.

In honing in on the definition of "fair market value," the court of appeals noted that the parties' 1992 negotiations could not possibly reflect the fair market value of the remuneration associated with the arrangement, as it had drastically changed with the opening of the pain clinic. Citing the statute's definition of fair market value, the Third Circuit also rejected the district court's explanation that a negotiated arrangement between parties is *per se* fair market value and states that agreements with referral sources are often entered into to disguise payments that are *not* fair market value.

Of note, the Third Circuit also rejected the notion that the freestanding pain clinic's status as a provider-based location of the main Hospital was relevant to this inquiry. The Third Circuit states that this status "has nothing to do with referrals or the concerns of the Stark Act." While the clinic's provider-based status does not alter the Group's status as a referral source or eliminate the requirement under the Stark Law that their financial relationships be consistent with FMV, the Third Circuit apparently failed to understand that the clinic's status would most likely affect the FMV analysis, itself, and whether some of the "benefits" provided to the Group are of the type that the Law would define as remuneration.

Moreover, although the court of appeals reversed the analysis of the district court and found that the arrangement did not comply with the personal services exception, it nonetheless remanded the case back to the district court for further findings. The district court will have to determine whether Dr. Kosenske can prove that the Hospital knew its claims compliance certification was false. The False Claims Act has a knowledge requirement which means that the entity submitting the claims knew, should have known, or acted in reckless disregard of the fact that the claims were false.

The end result of this litigation may be that Dr. Kosenske does not prevail on the merits. Even if Dr. Kosenske loses, however, this case has nonetheless offered a concerning and thought-

provoking analysis that other circuit courts and district courts are likely to follow. Over twenty years ago, the Third Circuit was one of the first courts to decide another fraud and abuse case, the *Greber* case, which ultimately became one of the most often cited cases in the field. The Third Circuit may have re-created this distinction with its *Kosenske* ruling.

### What This Means for Health Care Providers

Unlike the recent case of *United States v. Solinger*, in which the United States District Court for the Western District of Kentucky adopted a “goal and purpose-oriented perspective rather than a hyper-technical one,” this case applies the Stark Law in a more exacting, technical manner and emphasizes the importance of ensuring that all arrangements with potential referral sources meet all the requirements of a Stark exception. It also very significantly appears to require more specific FMV support for exclusivity and other items routinely provided in hospital-based contracts. Providers who may have taken for granted the FMV nature of these arrangements may as a result of the theory of this case have to take more care in establishing the support for their financial terms. In summary, the case highlights that health care providers should ensure that:

All arrangements explicitly set forth the bargained-for exchange between the parties, describe all forms of remuneration (e.g., exclusivity, office space) under the agreement and incorporate such remuneration in their FMV calculations;

All agreements (particularly “evergreen” or automatically renewing agreements and agreements with hospital-based physicians) are current with any appropriate amendments, and contain renewal terms or other provisions that prevent the lapse of such agreements;

Established agreements that are meant to cover (i) “new” (or closely related services, e.g., anesthesia versus pain management) services, (ii) new locations, and/or (iii) new or re-formulated groups of physicians, should be re-examined to determine whether a new agreement (or amendment) is needed and that the fair market value equation is still relevant; and

In light of this case and the elimination of the Stark “fair market value” safe harbor under Stark, each arrangement reflects fair market value and providers have the proper documentation to demonstrate such FMV.

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