

MEDICARE COMPLIANCE

With Stark as the Sword, DOJ Takes On Hospital Over Physician Incentive Pay

Physician incentive compensation is at the heart of a false claims lawsuit against Halifax Hospital Medical Center and Halifax Staffing Inc. in Daytona Beach, Fla. The Department of Justice alleges the hospital and affiliated staffing company violated the Stark law partly because their compensation for certain neurosurgeons and oncologists was linked to the volume and value of patient referrals.

The lawsuit was filed in July 2009 by whistleblower Elin Baklid-Kunz, who worked in the hospital's compliance department as revenue integrity coordinator before becoming director of physician services at Halifax Staffing. After a two-year investigation, DOJ announced that it is taking on parts of the case, including allegations the hospital used bonus pools to reward physicians for referring patients to the hospital. "The United States has now determined that it has good cause to intervene concerning defendants' financial relationships with various physicians, which the government believes violate the Stark law and led to the submission of false claims," according to its motion to intervene. If the U.S. District Court in Orlando accepts the motion to intervene, DOJ will file its own complaint by Nov. 8.

The message from the case is clear. "Unless hospitals structure their relationships with physicians very carefully, Stark makes for easy pickings and the government realizes that," says Macon, Ga., attorney Alan Rumph, with Smith Hawkins.

But Washington, D.C., attorney Reed Stephens, who represents Halifax Hospital and Halifax Staffing, says "a lot of this case has fallen away." The whistleblower's complaint is full of allegations of medically unnecessary admissions and anti-kickback violations, but "DOJ recognized there is no merit to any of those allegations," says Stephens, with McDermott, Will & Emery. As for Stark, "there is not any provision in any of the physician agreements that is considered *per se* illegal under Stark or any fraud and abuse law," he says.

This is at least the third public Stark-based false claims lawsuit now pending in federal districts around

the country. The U.S. attorney's office for the Western District of Pennsylvania has intervened in a whistleblower case against Bradford Regional Medical Center, which is accused of making inflated payments to two referring physicians for a nuclear-camera lease. A federal judge already ruled that the hospital violated Stark but sent the false claims and kickback allegations back for litigation because they require determinations of intent (RMC 3/21/11, p. 1). A "status conference," which is a meeting with all the parties and the judge about discovery and prospects for settlement, is scheduled for Sept. 28.

In South Carolina, Tuomey Healthcare System may face a second trial over Stark-based false claims allegations stemming from employment compensation for 18 part-time physicians. A jury already found that Tuomey violated Stark, but not the False Claims Act. In June 2010, however, the federal judge who presided over the trial decided he made mistakes and gave the U.S. attorney's office a second shot at proving false claims allegations against Tuomey, which is appealing the Stark verdict (RMC 6/14/10, p. 1). Two of the DOJ attorneys assigned to the Halifax case are also working on the Tuomey lawsuit.

And now here comes the Halifax Hospital case, which has twists and turns of its own. The 764-bed hospital is a governmental entity created by Florida statute as a special tax district, a fact that Stephens says undercuts the false claims lawsuit. "It doesn't have the same profit motive that other health systems have," says Stephens, a former attorney in DOJ's civil fraud section, which runs False Claims Act cases. The hospital's affiliate, Halifax Staffing, provides personnel for the hospital, although the two are separate legal entities. The whistleblower and the physicians entangled in this case are employed by Halifax Staffing and work exclusively for the hospital.

Sweetheart Deals With Docs Are Alleged

The lawsuit against Halifax describes a series of alleged sweetheart deals with three neurosurgeons and six oncologists, according to the complaint. The case

turns less on how much money the specialists made and more on how they made it, says Atlanta attorney Marlan Wilbanks, with Wilbanks & Bridges, who represents the whistleblower. “The Stark law has pockets of liability regardless of intent,” he says. “If you are compensated by bonus pools influenced by the volume or value of referrals, you fall outside the exceptions of the Stark law.”

The Stark law prohibits Medicare payments to entities that provide designated health services to patients when they are referred by physicians who have a financial relationship with these entities — unless an exception applies. Exceptions exist for employment, leases, personal service arrangements, recruitment and other hospital-physician deals. Most Stark exceptions contain universal criteria. For example, payments between the parties must be fair-market value and can’t take into account the volume or value of the physician’s referrals.

Here are some details of the alleged Halifax deals:

◆ **Halifax Hospital allegedly had what amounts to a profit-sharing arrangement with six medical oncologists who refer patients to the hospital.** Between 2004 and 2008, the oncologists’ contracts included an “incentive compensation pool” that was equal to “15% of the operating margin of the medical oncology program” at the hospital, the complaint alleges. In other words, the more patients the oncologists referred to the hospital for inpatient and outpatient hospital services, the more they got paid, says Atlanta attorney Scott Withrow, who also represents the whistleblower. It might have been permissible under Stark for the hospital to pay physicians based on services they personally perform, but that wasn’t the case here, he says. And the hospital couldn’t take cover in Stark exceptions for employment or independent contractor arrangements because the incentive compensation takes into account the volume or value of physician referrals, the complaint alleges.

The whistleblower broached the subject of the contracts’ alleged illegality with her superiors, the complaint states, but nothing good came of it.

◆ **Three neurosurgeons who referred patients to Halifax Hospital and provided services there have very favorable compensation terms,** according to contracts attached to the lawsuit. The hospital pays the neurosurgeons “incentive compensation equal to all net collections” for their services. “These neurosurgeons are being overpaid because of the large amount of money paid as an incentive for their referrals to defendant Halifax Hospital,” the complaint alleges. Total 2008 compensation for one of the neurosurgeons was \$1.725 million and for another was \$1.897 million; both figures are above fair-market value, according

to the complaint. “The recipient neurosurgeons are very important referral sources for defendant Halifax Hospital,” generating \$22 million annually in hospital revenues from surgeries, the lawsuit alleges.

Specifically, the Halifax Staffing contract with one neurosurgeon for 2003 to 2004 paid him an annual base salary of \$325,000 plus “incentive compensation equal to all net collections for employee’s services” that exceeds the salary. A 2007 amendment obligated Halifax Staffing to pay for seven nonphysician employees, including an office manager and two physician assistants (PAs), who work at the practice that the neurosurgeon shares with another neurosurgeon. The hospital also pays the neurosurgeons the fees generated by their PAs, and then pays the PAs’ salaries, says Wilbanks.

More Surgeries = More Money

Because the neurosurgeons’ compensation increases with every procedure performed at the hospital, “it behooves them to admit patients,” says Withrow, who is with Withrow, McQuade & Olsen. “You do more spinal fusions, you get more money.”

The whistleblower again tried to convince management that the hospital was playing with Stark fire by allegedly exceeding fair-market value in its compensation, and suggested obtaining an independent fair-market analysis. But this allegedly backfired. Management called a meeting with the three neurosurgeons, during which fair-market value was not mentioned. Instead, Halifax management allegedly devised a method to pay the neurosurgeons more. “The net effect was to increase their current compensation packages,” the complaint alleges.

But there are cracks in the Stark allegations, says Rumph, who is not involved in the case. The whistleblower’s argument, which the government has adopted, is that hospitals can’t pay doctors any bonus or incentive compensation unless it’s based on personally performed services. “That overstates Stark and is overly broad,” Rumph says. The Stark law allows both hospital employees and independent contractors — whether they contract with the hospital directly or through a staffing company — to receive incentive compensation as long as it doesn’t take into account (1) employed physicians’ referrals of designated health services or (2) independent-contractor physicians’ referrals for designated health services or other business they generated, Rumph says.

In fact, the earlier terms of the hospital’s contract with the oncologists “probably would not have been a Stark problem,” Rumph says. It states the doctors will be paid “an equitable portion of an Incentive Compensation pool which is equal to ninety percent (90%) of

cash collections received as of September 30 that exceed...\$2,342,286.00 and are attributable to billings for professional services related to patient care, hereinafter the 'Production Base,' provided by [the five members of the medical oncology practice]."

MD Services Aren't 'Designated Health Services'

Although the incentive payments were not exclusively based on each oncologist's personally performed services, they are based collectively on the services of the medical oncology group, he notes. "Even if billed by a hospital, physician services are not designated health services," Rumph says. Fair-market value would have been the Stark smell test, but the complaint doesn't have a bone to pick with the fair-market value of the oncologists' incentive compensation, Rumph says.

Stephens says there's no Stark case to be made against Halifax. "The allegations against the oncologists are very thin," Stephens says. "DOJ appears to be

speculating that the incentive provision in the medical oncologists' agreement wasn't paid based on each individual's level of personally performed services." *Au contraire*, he says. Halifax's payments were based on their productivity — how many patients they saw, how many hours they worked, their work relative value units.

As for the neurosurgeons, Stephens says "we haven't seen any evidence the compensation paid is not fair-market value." Halifax Hospital is a level two trauma center that has an agreement with the state to provide neurosurgery 24/7. "We have shown the hospital has an exceptionally high level of transfer cases from other hospitals," requiring the neurosurgeons to work long hours.

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