

ANESTHESIA GROUPS NOT IMMUNE FROM STARK LAW RISK

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Traditionally, exclusive anesthesia services contracts have not received a significant degree of scrutiny with respect to compliance with the federal Stark Law. As a result, contracts for anesthesia services have often fallen outside the typical compliance review process that applied to other hospital-based exclusive arrangements. This has changed, however, due to a recent decision from a U.S. Court of Appeals, which elevates the level of Stark Law risk to which both anesthesia groups and hospitals that contract for anesthesia services might be subject. Specifically, in *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, the Court of Appeals for the Third Circuit (there are twelve Circuits in the federal appellate system; appellate decisions are only binding in the Circuit in which they were issued, but they may influence courts in other Circuits) found that an exclusive contract between an anesthesia group practice and a local hospital raised a potential violation of the Stark Law. *Kosenske* was brought by a qui tam plaintiff under the Federal False Claims Act (the “FCA”) predicated on the theory that submitting and billing claims in violation of the Stark Law constitutes a false claim under the FCA.

In *Kosenske*, the Court determined that the anesthesiologists “received numerous benefits as a result of [their] relationship with [the hospital], including the exclusive right to provide all anesthesia and pain management services, and the receipt of office space, medical equipment and personnel.” The Court believed that this in-kind remuneration must meet a Stark Law



exception; otherwise, all of the referrals from the anesthesiologists to the hospital were impermissible.

The Court also decided that the contract (which was never amended) between the anesthesiologists and the hospital did not cover the changed circumstances of the parties, including the provision of services at a new pain clinic facility owned by the hospital. Notably, after the execution of the contract, the anesthesia group expanded its services and began providing pain management services to its own patients. The group’s pain patients were capable of being referred to the hospital.

Thus, with the referrals by the group to the pain management clinic (which permitted the hospital to bill the facility fee) the anesthesia group became a referral source that had a

compensation relationship with the hospital. Specifically, several years after the execution of the agreement, the hospital built a stand-alone facility containing an outpatient ambulatory surgery center and a pain management clinic. The Court noted that the hospital did not charge the anesthesiology group rent for the space and equipment, or a fee for the support personnel it provided to the anesthesia group practice when it performed pain management services at the pain clinic. The Court held that the contract between the parties did not fall within the physician services exception to the Stark Law: because the written agreement was drafted before the pain facility existed, there was no evidence of fair market value or any specific consideration given for the free use of the pain clinic. Thus, with respect to pain management services, the hospital was furnishing things of value (e.g., space and personnel), without charge, to physicians who were then in a position to refer to the hospital for pain management services at the hospital’s clinic. As such, the arrangement was not distinguished from a situation in which the hospital was to provide incentives to a medical staff member to induce the physician to refer for outpatient hospital services. Thus, the Court’s comments were based, in large measure, on a distinction it made between anesthesia services at the hospital and pain management services at a hospital-owned outpatient pain clinic.

In summary, the important feature in *Kosenske*, and what truly distinguished the operation of the outpatient clinic

from the hospital inpatient service was provision of hospital space, equipment and personnel exclusively to the group. When analyzing relationships from a Stark Law perspective, hospitals and anesthesia groups can draw the following from the *Kosenske* case:

- If a hospital offers a group the exclusive right to staff a clinic or department and no other physicians are permitted to provide these services, that exclusivity likely will be characterized as remuneration under the Stark Law. For the arrangement to comply with the Stark Law, there would need to be a written agreement in place that meets an applicable Stark Law exception. However, if the anesthesia group is not billing as if it is treating patients in their office, and the hospital is registering the patient as a hospital patient and billing a facility or technical component for any services rendered by the group, then the mere fact that a group is staffing a hospital-based clinic does not create a financial relationship under the Stark Law. No written agreement would be required under Stark in those circumstances.
- Granting a physician/group an exclusive right to provide professional services has value and thus creates a financial relationship for purposes of the Stark Law. If, through an exclusive arrangement, the hospital is providing space, staff and equipment, then so long as such items are used exclusively by the physician/group to provide the exclusive service (the benefit of which inures to the hospital), these items should not implicate Stark Law concerns. However, if any of these items are not used, exclusively, to provide the service for the hospital's benefit then the Stark Law is implicated. By contrast, if the group is seeing private patients for

which the hospital is not billing the technical component or otherwise generating revenue, the physician/group must pay fair market value for the use of these items and services.

- Ultimately, when reviewing an arrangement among a physician/group and a hospital, the parties should determine whether the physician/group receives anything of value beyond the mere right to exercise medical staff privileges at the hospital. If the physician/group does not receive anything of value, then the arrangement does not create a financial relationship under the Stark Law. If the physician/group does receive something of value, there may be a financial relationship for purposes of Stark and the arrangement will need to be structured in compliance with an applicable Stark Law exception.

There are several potential Stark Law exceptions that may apply to an arrangement between an anesthesia group and a hospital. One of the major Stark Law exceptions that could be used to protect an exclusive services agreement between an anesthesia group and a hospital is the Fair Market Value Exception. This exception protects compensation between an entity such as a hospital and a physician or group of physicians for providing services to the hospital.

In order to qualify for the Fair Market Value Exception, the compensation arrangement must:

- (1) be set out in writing, covering only identifiable items or services;
- (2) specify the time frame for the arrangement;
- (3) specify the compensation – the compensation must be set in advance, be consistent with fair market value, and not be determined in any manner that

takes into account referrals or other business generated by the physician;

- (4) be commercially reasonable and further the legitimate business purposes of the parties;
- (5) not violate the anti-kickback statute or other laws regulating billing or claims submission; and
- (6) not include services that involve the counseling or promotion of a business arrangement that violates the law.

Anesthesia groups that have exclusive services arrangements with hospitals may also be able to protect their arrangements through the Personal Services Exception which requires the following:

- (1) the arrangement is set out in writing, is signed by the parties, and specifies the services covered by the arrangement;
- (2) the arrangement(s) covers all of the services to be furnished by the physician;
- (3) the aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement(s);
- (4) the term of the arrangement is for at least one year;
- (5) the compensation to be paid over the term of the arrangement is set in advance, does not exceed fair market value, and, except in the case of a physician incentive plan, is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties; and

ANESTHESIA GROUPS NOT IMMUNE FROM STARK LAW RISK

Continued from page 19

- (6) the services to be furnished under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any law.

Finally, when the anesthesia group has an exclusive arrangement with a hospital under which the hospital is providing space, but the a group is not using the space exclusively to provide the professional services that underlie the parties' entry into the arrangement and permit other hospital services (e.g., surgical and labor delivery services) to be the anesthesia group must pay fair market value for the use of the space. The Fair Market Value Exception set forth above will not protect the lease of space. Instead, the lease of space should be structured to comply with the Rental of Office Space Exception, which requires the following:

- (1) the lease is in writing, signed by the parties and specifies the space;
- (2) the term of the lease must be at least one year;
- (3) the space leased must not exceed what is reasonable and necessary for the legitimate business purposes of the lease, and the lessee uses it on an exclusive basis (except for common areas);
- (4) the rental charges over the term of the lease are set in advance and consistent with fair market value;
- (5) the rental charges over the term of the lease are not determined in a manner that takes into account the value or value of any referrals or other business generated between the parties; and
- (6) the lease would be commercially reasonable even if no referral were made between the parties. Anesthesia groups must be cognizant of the fact that effective October 1, 2009, percentage-based compensation and "per-click" payments in space leases will no longer be permitted under the Stark Law.

This article is intended as only a brief overview of the Stark Law's applicability in the anesthesia context. The *Kosenske* case should serve as a means to ensure that anesthesia groups consider that the Stark Law may apply to their current arrangements with hospitals. Accordingly, anesthesia groups should have experienced health law counsel review their financial arrangements with hospitals to ensure that they are structured to comply with an applicable Stark Law exception. ▲



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