Questionable Stark Law Case Eases Burden on Qui Tam Relators

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In a September 17th opinion, the 3rd U.S. Circuit Court of Appeals overturned a District Court decision dismissing whistleblower claims against the University of Pittsburgh Medical Center ("UPMC") alleging violations of the Stark Law and the False Claims Act ("FCA").[I] The claims stem from allegations of improper compensation paid by UPMC to a number of employed neurosurgeons. At the heart of this case is the compensation structure described in employment agreements between the neurosurgeons and UPMC-affiliated entities. The physicians' compensation was made up of a base salary and a bonus based on the amount of work each physician actually performed throughout the year. The more work the physicians performed, the larger their productivity bonus. If the physicians failed to meet their production targets, their base salary would be reduced the following year. The Court held that the plaintiffs in the case, a neurosurgeon and other former UPMC employees, had provided enough evidence to plausibly allege violations of the Stark Law and the FCA, meaning that the case can move forward to the discovery phase of the litigation.

This case is significant for a number of reasons. First, the Court's interpretation of the Stark Law sets the bar to discovery very low, which will arguably make it easier for relators to bring Stark-related FCA actions involving compensation arrangements in the future. Second, the Court's application of the intent requirement in the FCA claim effectively shifted the burden of proof from the plaintiffs to the defendant. Third, the underlying allegations made by the whistleblowers involve a productivity-based compensation structure that is extremely common in hospital-physician arrangements. These three key takeaways from the Court's opinion are examined further below.

The Court's opinion in this case is aggressive (arguably flawed), and may have been influenced by allegations of claims submitted for services not performed and other similar alleged fraud. As written, the holdings could arguably be applied to any hospital-physician relationship which falls under the Stark Law – a common occurrence – and has additional language which increases risk with respect to any hospital-physician relationship where a physician is paid based on productivity and/or compensation is on the high end of fair market value.

In the current post-*Tuomey* Stark Law enforcement environment, this decision further demonstrates that it is more critical than ever for hospitals and affiliated entities that employ or contract with physicians to very closely evaluate the compensation paid to physicians, paying particular attention to compensation

with incentive or bonus components and compensation that falls on the high end of a fair market value range.[ii] In addition, hospitals would be well advised to complete files for each arrangement with physicians that document compliance with an applicable Stark Law exception, including documentation regarding fair market value and the business rationale for the arrangement, and consider implementing additional safeguards such as auditing of records where productivity appears to be an outlier, to ensure the services are being performed as billed and at the standard of care expected of the physician.

Low Threshold for Reaching Discovery Phase in an FCA Action Involving Indirect Compensation Arrangements

One troubling aspect of this case is the low threshold the Court requires for a FCA case predicated on Stark Law violations to survive a motion to dismiss and move to discovery. The Court defines a *prima facie* Stark Law violation as having three elements: (1) referrals for designated health services; (2) a compensation arrangement (or ownership or investment interest); and (3) a Medicare claim for the referred services. It goes on to state that this "combination of factors suggests potential abuse of Medicare. When they are all present, we let plaintiffs go to discovery." That statement, on its own, is so broadly worded that it implicates almost all direct or indirect physician relationships with hospitals, the vast majority of which are presumably compliant with law (although relators would still need to plead a FCA violation).

In this case, because the compensation arrangement was not directly between the hospital and the physicians, the relator alleged that there was an indirect compensation arrangement, which is defined under Stark to, among other things, include aggregate compensation that *varies with* or *takes into account* the volume or value of referrals. If there is no indirect compensation arrangement, the Stark Law would not apply. In analyzing whether an indirect compensation arrangement exists, the Court discusses at length that "varies with" means "correlation," and "takes into account" means "causation," meaning to show that an indirect compensation arrangement exists one need show only that compensation tends to rise and fall in "correlation" with the volume or value of referrals. In doing so, the Court notes that the Stark Law:

"casts a wide net of initial suspicion, followed by narrower safe harbors. A correlation between pay and referrals suggests that hospitals are rewarding doctors for referrals. And healthcare providers get to use the Stark Act's exceptions [which, under these circumstances, would require that compensation "take into account" volume or value of referrals] to show that there is no problematic causal relationship. Only if they cannot should those cases go to discovery."

The court noted that because these neurosurgeons were practicing at UPMC, every time they performed a procedure at a UPMC hospital they made a referral of the associated hospital claims. According to the Court, if the compensation in fact varied with the value of the physician's Medicare referrals, which it did by definition, arguably that correlation could be used to establish violations of the Stark Law and the False Claims Act.

In its conclusion, the Court identifies the following key allegations of the relator as sufficient to survive a motion to dismiss in this case: a compensation relationship that varies based on referrals, submission of claims to Medicare for the corresponding facility fee, and the hospital's knowledge of the physicians' compensation, and states: "With all this smoke, a fire is plausible." While the Court may have been influenced by the particular factual allegations in this case, the Court's holding is more broadly stated. Although the Court acknowledges in passing the concurring opinion's "legitimate concerns about opening the floodgates of litigation," the Court quickly dismisses this concern by putting the burden on the Department of Justice to dismiss *qui tam* actions over a relator's objection to bar frivolous cases from reaching discovery.

What is troubling about this conclusion is that it implies the mere fact that a physician is compensated based on personal labor in a hospital setting, where by necessity there is a corresponding facility fee payable to the hospital, is enough to be suspect. As described by Judge Ambro in his concurring opinion, the decision suggests "that any hospital that pays its affiliated physicians according to some metric of the work they personally perform at the hospital falls under suspicion of violating the Stark Act."

Burden of Proof and Intent Requirements

The Court also addressed the interplay between the Stark Law and the FCA, with respect to what a plaintiff must plead. The defendants raise a compelling, and in our view the better, argument that because the FCA includes falsity and knowledge elements, a plaintiff must also have to plead that no Stark Law exception applies, as opposed to putting the burden on the

defendants to raise as an affirmative defense. The defendants argued that if a person thinks an exception applies, they would not know that a claim is false, which is a key element of a FCA action. While the Court acknowledges that such argument "has force," it is immediately rejected based on prior precedent. The Court holds that a defendant has the burden to plead the applicability of a Stark Law exception.

Under the Stark Law, where an entity's claim for designated health services is denied due to noncompliance with the Stark Law, if the entity appeals the payment denial the entity, not CMS, bears the burden of proof that a Stark Law exception applies.[iii] This might make sense when the entity is contesting a payment denial. However, placing this same burden on a defendant in a FCA case does not make sense, since one of the key elements in a FCA case is for the plaintiff to allege that the false claim was submitted knowingly (meaning with actual knowledge, reckless disregard, or deliberate ignorance). Particularly because a vast majority of hospital-physician financial relationships likely fall within a Stark law exception in compliance with law, it seems that the plaintiff should have to allege that the defendant submitted claims with actual knowledge, reckless disregard, or deliberate ignorance that no Stark Law exception is available.

The Court goes on to note that even if a plaintiff would have the burden of pleading no Stark Law exception applies, the plaintiff did so here, since the affiliated entities had overlapping officers and board members, the hospital received data regarding compensation and productivity, there was a centralized billing department, the entities were familiar with the Stark Law and the fact that indirect compensation arrangements existed, and the entities "knew or recklessly disregarded" that the compensation varied with referrals and allegedly exceeded fair market value (addressed further below). As with the discussion regarding the compensation structure, what the Court fails to acknowledge is that based on this standard, these same circumstances could potentially be alleged at every hospital where a board receives financials and approves compensation packages, including hospitals that directly employ physicians as part of their workforce, where a physician's compensation is on the high end of fair market value.

Compensation In Excess of Fair Market Value and "Taking Into Account" Referrals

Although the "correlation" between compensation and referrals was sufficient to survive a motion to dismiss, the court focused on additional factors in its opinion in taking the position that the plaintiff had also pled "causation," noting that where aggregate compensation exceeds fair market value that can also be evidence that the compensation takes into account the volume or value of referrals, and both concepts are incorporated in the applicable Stark Law exceptions.

The Court stated that the following allegations, when read together, make plausible claims that the physician compensation exceeded fair market value: (i) compensation exceeded collections, (ii) compensation exceeded the 90 th percentile, (iii) productivity exceeded the 90th percentile, (iv) the bonus per "Work Unit" exceeded the Medicare rate, and lastly, (v) the relators alleged fraudulent practices including use of incorrect coding or submitting claims for services not performed.

Although in some circumstances the first four factors could indicate a potential compliance issue, in many cases there may be a legitimate underlying rationale (the fifth factor, if true, is clearly a problem). For example, with respect to the first factor, although the concept that compensation exceeding collections suggests a violation has gotten some traction in various court decisions, physicians are often compensated not just for providing professional services, but also for providing a range of other services including medical direction, on call coverage and other administrative services. Also, CMS has long recognized that some subsidization may be necessary for certain physician arrangements, such as in an academic medical center setting in order to support the teaching and research mission, and to serve community need.

With respect to the second factor, 10 percent of all physicians by definition are paid above the 90 th percentile, and that does not mean those physicians are being paid above fair market value under the circumstances (there are many legitimate reasons to pay this amount, such as if the compensation reflects a significant community need, the physician is an outlier with respect to how much time they dedicate to work, and/or the physician stands out as a leader in the field).

Similarly, with respect to the third factor, while physicians with productivity exceeding the 90 th percentile are outliers, and this case did allege that some of the productivity numbers stretched the imagination of what is possible, most physicians who

have that productivity level are just extremely busy and committed to a work schedule that most would not want.

It is also worth noting that payment based on productivity, which could lead to higher compensation that "correlates" with referred services to hospitals, is an extremely common compensation method. In many ways setting minimum wRVU threshold expectations, paying unit-based compensation in additional, set-in-advance increments for additional wRVUs personally performed, and potentially adjusting compensation if a physician does not meet a minimum threshold, can be viewed as a safeguard against fraud and abuse as it protects against overcompensating a physician who is not putting in sufficient work effort for the remuneration received, but may otherwise be generating referrals to a hospital. In our experience, independent valuation firms often look to historical and anticipated wRVUs in assessing fair market value compensation, and in some instances may recommend setting minimum wRVU thresholds to ensure the services provided warrant the level of compensation received. CMS itself, in commentary addressing the bona fide employee exception under the Stark Law, made clear that paying a productivity bonus in a hospital setting is permissible. In response to a commenter's inquiry regarding a hospital-employed physician assigning the right to bill to the hospital and receiving payment from the hospital for each patient seen at an outpatient clinic, meaning the physician services are "inevitably linked" to a facility fee billed by the hospital, CMS responded that "[t]he fact that corresponding hospital services are billed would not invalidate an employed physician's personally performed work, for which the physician may be paid a productivity bonus (subject to the fair market value requirement)."[iv]

For more information, please contact Amy Joseph or David Schumacher in Boston, Ben Durie or Paul Smith in San Francisco, or Charles Oppenheim or David Henninger in Los Angeles, or your regular Hooper, Lundy & Bookman contact.

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[i] *United States. ex rel. Bookwalter* v. *UPMC* (Sept. 17, 2019, No. 18-1693) __ F.3d ___ (3d Cir. 2019).

[ii] This opinion is one of several notable cases and enforcement actions in recent years involving compensation of employed physicians, including U*.S. ex rel. Drakeford v. Tuomey, U.S. v. Halifax Hosp. Medical Center*, and *U.S. ex rel. Reilly North Broward Hosp. Dist*.

[iii] 42 C.F.R. § 411.353(c)(2).

[iv] 69 Fed. Reg. 16089 (March 26, 2004).

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