

Anatomy of a Federal Investigation and Trial for Alleged Stark and Anti-Kickback Violations

Lessons Learned

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Recently, a large number of New Jersey cardiologists were investigated by the United States Attorney's Office for allegedly receiving kickbacks in exchange for referring their patients to a hospital. What appeared to be innocent employment contracts between the cardiologists and the hospital became the basis for a sweeping federal investigation. Many of the cardiologists paid large settlements to the government, which far exceeded the salaries the doctors had received under their contracts. Some of the cardiologists even pleaded guilty to criminal charges! A single cardiologist was able to fight off the government and defeat the charges that he had participated in an illegal kickback scheme.

This story provides a cautionary tale for physicians who enter employment contracts or financial relationships with hospitals and other institutions, and who provide services to patients under the federal health care programs, including Medicare.

The Government Investigates the UMDNJ Cardiology Program

In 2003, a former faculty member of the University of Medicine and Dentistry of New Jersey – New Jersey Medical School (“UMDNJ”) filed a “whistle-blower” suit, triggering a federal investigation of the UMDNJ cardiology program. In 2006, a Federal Monitor released a report finding that high-level UMDNJ officials had devised a scheme to enter “sham” employment contracts with various local cardiologists to serve as “Clinical Assistant Professors.” The report found that the cardiologists performed little or no work, but still received “salaries,” which actually were kickbacks paid in exchange for referring their

patients to UMDNJ for surgical procedures. In 2009, UMDNJ paid an \$8.3 million settlement to the United States to settle these claims that it had paid kickbacks to the cardiologists, and that it had submitted false claims to Medicare for the cardiac procedures which resulted from the kickbacks.

The Government Takes Aim Against Individual Cardiologists

After the UMDNJ settlement, the United States government then demanded payment from – and, in some cases, threatened criminal charges and jail sentences against – many of the cardiologists who had employment contracts with UMDNJ. All but one of those doctors entered criminal guilty pleas or civil settlements with the government. The settlements typically required the cardiologists to pay the government twice the amount they had received under their contracts. Needless to say, the guilty pleas and settlements were highly publicized by the United States Attorney's Office, generating much negative publicity regarding the cardiologists.

A Fight to the Finish

This author represented the single cardiologist who refused to settle with the government. The cardiologist had entered an employment contract with UMDNJ, which contained a non-exclusive list of services. The government alleged that the cardiologist performed few of the services listed in this contract and that he had entered a “sham” contract and accepted a salary in exchange for referring patients to UMDNJ for cardiac surgery.

The government charged that the cardiologist had violated the federal Anti-Kickback Statute

and the Anti-Self Referral Act (or “Stark Law”). The Anti-Kickback Statute, 42 U.S.C. §1320a-7b et seq., makes it illegal to knowingly and willfully offer, pay, solicit or receive something of value to induce business reimbursed under a federal health care program such as Medicare. The Stark Law, 42 U.S.C. §1395nn, et seq., makes it illegal for a physician to make referrals for services to an entity in which the physician or an immediate family member has a financial relationship (including an employment contract or ownership interest), unless the physician meets an exception such as having a “bona fide employment relationship” for fair market value. The government also charged the cardiologist with violating the federal False Claims Act, by causing UMDNJ to submit “false claims” (bills) to Medicare for the patients whom the cardiologist referred to UMDNJ. A finding of liability under the False Claims Act will result in the award of triple damages, civil penalties, and investigation and litigation costs against a physician.

The cardiologist accused by the government contended that he had performed a substantial amount of the services listed in his contract. The cardiologist argued that he would have performed all of the listed services, but he was denied that opportunity by UMDNJ. The cardiologist also performed other substantial services for UMDNJ which were not specifically listed in his contract, but which he maintained were part of the employment arrangement and were of great value (such as on-call services). In sum, the cardiologist contended that he had entered a “bona fide employment relationship” and had performed legitimate services for fair market

value. The cardiologist denied any knowledge of or participation in a kickback scheme.

In March 2011, this case went to a jury trial in the United States District Court, Newark, New Jersey. This was the first and only case from the federal investigation of the UMDNJ cardiology program that actually went to trial. At the conclusion of the trial, the jury found in favor of the cardiologist on all issues. The jury found that the physician did not violate the Anti-Kickback Statute, and that he had a “bona fide employment relationship” with UMDNJ for fair market value which did not violate the Stark Law. As a result, there was no violation of the False Claims Act.

Lessons Learned

Despite the ultimate positive outcome for the single physician who went to trial against the government, the UMDNJ cardiology scandal and the numerous guilty pleas and settlements resulting from that investigation present a cautionary tale of lessons to be learned.

- Employment contracts with hospitals are subject to rigorous analysis for compliance with the Anti-Kickback Statute and the Stark Law.
- The government will aggressively pursue what it views as any violations of the Anti-Kickback Statute and the Stark Law. This could extend to physicians’ relationships with ambulatory surgery centers.
- Physicians should not assume that their employment contracts with hospitals are lawful.
- Physicians must be aware of the actual services rendered under their contracts, not just the contract language, in order to help assure compliance with law.
- The fact that a physician rendered necessary, valuable and legitimate medical services, will not lower the amount of damages awarded against a physician for a False Claims Act violation, if the court concludes that the Anti-Kickback Statute or the Stark Law was violated and that “false claims” for payment were submitted to Medicare due to those violations.

Physicians should keep these lessons in mind when they enter employment contracts or other financial arrangements with institutions including hospitals. Otherwise, they may end up facing criminal charges or civil suits filed by the government. Experience from the UMDNJ cardiology scandal shows that while it is possible to take on the government and win, most physicians who face the threat of civil suits by the government will end up entering into costly settlements with the attendant negative publicity, rather than risking an even worse outcome at trial.

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