

Federal Appellate Court Applies Stark and Anti-Kickback Laws to Anesthesiologists' Exclusive Contract and Pain Management Arrangements

February 11, 2009

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A Jan. 21 ruling by the Third Circuit Court of Appeals underscores the need to structure exclusive services contracts and pain management arrangements to comply with the Stark Act and the Anti-kickback Statute, as well as the potential criminal and civil liability that can result from failure to do so. (*United States ex rel. Kosenske v. Carlisle HMA, Inc.*).

In *Kosenske*, the Third Circuit provided a rare judicial analysis of the Stark Act and the Anti-kickback Statute as applied to financial arrangements between a hospital and an anesthesiology group.

The anesthesiology group had an exclusive contract with the hospital for the provision of "traditional" anesthesia services. The group later also began furnishing pain management services at both the hospital and a free-standing pain clinic owned by the hospital. The court noted that "traditional" anesthesia services generally do not involve patient referrals and that, as such, the Stark Act and the Anti-kickback Statute did not apply to that aspect of the arrangements.

Conversely, however, the court held that the group's referral of pain clinic patients to the hospital for diagnostic tests and treatment and the group's receipt of free office space, equipment and staff at the pain clinic constituted referrals, remuneration and a financial relationship sufficient to place the pain clinic arrangements squarely within the purview of both the Stark Act and the Anti-kickback Statute.

Significantly, the court also held that the pain clinic arrangements did *not* satisfy the requirements of either the personal services exception to the Stark Act or the related Anti-kickback Safe Harbor. In ruling that the parties failed to prove that the exception or safe harbor applied, the court focused on the fact that they did not amend their written exclusive contract to address the pain clinic arrangements and failed to establish the fair-market value of the anesthesiologists' compensation under those

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arrangements.

The *Kosenske* case underscores the potential liability posed by exclusive services contracts and pain management arrangements, and the need to structure them to comply with the Stark Act and the Anti-kickback Statute, both at the inception of the arrangements *and* as they change over time. Failure to do so can result in both criminal and civil liability, as well as exclusion from participation in federal healthcare programs.

Should you have any questions about the *Kosenske* case or about compliance issues posed by your contracts or financial arrangements, please contact your Plunkett Cooney attorney, or in the alternative, the leader of Plunkett Cooney's Healthcare Industry Group, Mark S. Kopson, at (248) 901-4061 or mkopson@plunkettcooney.com.