

Maryland Court Upholds the State's Physician Self-Referral Law

In a January 2011 decision, the Maryland Court of Appeals upheld that the state's patient referral law prohibiting group practice providers from referring their patients to other members of their group for certain tests and services.¹ In *Potomac Valley Orthopaedic Associates v. Maryland Board of Physicians*, the Maryland Board of Physicians (the Board) issued a Declaratory Ruling that the state's self-referral law does not exempt in-house physician referrals of magnetic resonance imaging (MRI) scans when the "referring physician has a financial interest in the performance of that scan."² In reaching their decision, the Board addressed three specific exceptions outlined in the legislation.³

The Maryland Self-Referral Law expressly prohibits healthcare practitioners and their agents from referring patients to a healthcare entity in which that healthcare practitioner, or his/her family members, have a financial interest.⁴ However, the statute provides certain exceptions to the general prohibition, three of which were addressed in the Board's decision: the "group practice exception," the "direct supervision exception," and, the "in-office ancillary services exception."⁵

Regarding the "group practice exception," the Board stated that, based on case studies, the exception was meant to allow the transfer patient care from one physician to another within a practice, not to allow the referral of "services or tests."⁶ The Board further ruled that the "direct supervision exception" was intended to parallel an American Medical Association (AMA) regulation that permits referrals for services and tests to outside entities where the practitioner directly performs or supervises the service, but not in-office referrals.⁷ With respect to the "in-office ancillary services exception," the Board found that MRI, Radiation Therapy, and Computer Tomography (CT) scan services were expressly excluded.⁸

In reviewing the case, the Court of Appeals looked to guidance from the Attorney General, which had previously opined that interpreting the law's exceptions to include the in-house referral from one physician to another for services such as MRIs and CTs would negate the meaning of the in-office ancillary services exception.⁹ Finally, the Court noted that proposals to include MRI and CT services exceptions have been suggested numerous times, and every time the state legislature failed to adopt such proposals. The Court

further highlighted that "legislative inaction" may be as significant as legislative action when bills are repeatedly introduced, and repeatedly rejected.¹⁰

While the Patient Protection and Affordable Care Act permits the Secretary of the Department of Health and Human Services to waive compliance with federal Stark Laws for Accountable Care Organizations (ACOs), there is no indication of how physicians and hospitals seeking to align themselves with one another in the coordination of patient care will comply with state self-referral laws, such as the one upheld by the Maryland Court of Appeals.¹¹ As the national focus on integrated care grows, and ACO programs become more prevalent, state legislatures will likely be forced to address regulatory issues, and potential conflicts, going forward.

¹ "State High Court Upholds Board Declaration Prohibiting Referrals Under Maryland Statute" BNA's Health Law Reporter, Vol. 20, February 3, 2011.

² *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 1 (Md. 2011) (court opinion not yet released for publication).

³ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 1 (Md. 2011) (court opinion not yet released for publication).

⁴ Maryland Self-Referral Law, MD Code Health Occ. § 1-302 (2000).

⁵ MD Code Health Occ. § 1-302(d)(2); MD Code Health Occ. § 1-302(d)(3); MD Code Health Occ. § 1-302(d)(4).

⁶ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 4 (Md. 2011) (court opinion not yet released for publication).

⁷ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 5 (Md. 2011) (court opinion not yet released for publication).

⁸ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 6 (Md. 2011) (court opinion not yet released for publication).

⁹ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 8 (Md. 2011) (court opinion not yet released for publication).

¹⁰ *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, No. 18, 2011 WL 198239, at 10 (Md. 2011) (court opinion not yet released for publication).

¹¹ "Patient Protection and Affordable Care Act" Pub. L. 111-148, March 23, 2010, p. 277; "Written Comments of the California Hospital Association for the Federal Trade Commission, Department of Health and Human Services, Centers for Medicare & Medicaid Services Workshop Regarding Accountable Care Organizations, and Implications Regarding Antitrust, Physician Self-Referral, Anti-Kickback, and Civil Monetary Penalty Laws Public Workshop" California Hospital Association (October 5, 2010), Accessed at <http://www.ftc.gov/os/comments/aco/100927cha.pdf> (Accessed 2/14/11).



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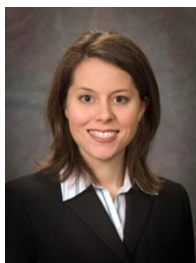
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