

Qui Tam Action Alleging Violation of Stark and Anti-kickback in Hospital-Physician Arrangement Headed to Trial

On March 31, 2010, the U.S. District Court for the middle district of Pennsylvania decided to send a whistleblower suit regarding violation of physician referral and kickback laws in a hospital-physician practice relationship to trial.¹ The original qui tam action, filed by Ted D. Kosenske, M.D. on November 14, 2007, alleged that Carlisle Hospital (Carlisle) and its parent company, Health Management Associates, Inc. (HMA) violated Stark law (42 U.S.C. § 1395nn) and the Anti-kickback Act (42 U.S.C.S. § 1320a-7b) in its arrangement with Blue Mountain Anesthesia Associates, P.C. (BMAA).²

As of the federal district court's recent decision, there was very little case precedent involving application of Stark law, some believe, due to the complexity of the Stark law, as well as the magnitude and onerous nature of enforcement penalties.

In the current case, under a 1992 agreement between BMAA and Carlisle Hospital and Health Services (former operator of Carlisle and hereinafter referred to as "CHHS"), BMAA gained the exclusive right to provide anesthesiology and pain management services at Carlisle in return for office space, supplies, equipment and personnel. In 1998, CHHS offered BMAA to continue providing exclusive pain management services at the pain management clinic of the newly constructed Carlisle Regional Surgery Center under the terms of the executed 1992 agreement. Additionally, when HMA purchased several assets from CHHS, including the surgery center, BMAA was allowed to continue providing services under the terms of the 1992 contract.

The relator, Dr. Kosenske, a anesthesiologist formerly employed by BMAA, who left the practice in 2005 and opened an independent competing pain management practice, alleged that the arrangement between BMAA and Carlisle constitutes a violation of Stark law, as the space, supplies, equipment, personnel, and other benefits provided to BMAA physicians were an inducement for patient referrals. In addition, Kosenske claims that Carlisle submitted false claims to Medicare for pain management services supplied by BMAA.³

Although the court's original 2007 decision dismissed the suit, claiming that the agreement fell under the *personal services exception* of the Stark law and therefore was not legally impermissible under Stark law or the Anti-kickback statute, the U.S. Court of Appeals for the Third Circuit remanded the case back to the trial court after reversing the District Court's 2007 decision, stating "*arguable*" evidence regarding referrals and Carlisle and HMA compliance with Stark law.⁴ In the ensuing trial, Carlisle and HMA will bear the burden of demonstrating that their actions regarding the arrangement with BMAA were covered by the Stark law's *personal services exception*.

- ¹ "United States of America ex rel. Ted D. Kosenske, M.D., Plaintiff v. Carlisle HMA, Inc., and Hospital Management Associates, Inc., Defendants", No. 1:05-CV-2184, March 31, 2010 U.S. Dist. LEXIS 31619; Also see "42 U.S.C. § 1395nn Limitation on certain physician referrals", http://www.law.cornell.edu/uscode/html/uscode42/uscode_42_0001395--nn000-.html (Accessed 10/13/2009) and "42 U.S.C.S. § 1320a-7b. Criminal penalties for acts involving Federal health care programs", LEXSTAT, 2008
- ² "United States of America ex rel. Ted D. Kosenske, M.D., Plaintiff v. Carlisle HMA, Inc., Carlisle Regional Surgery Center, Carlisle Regional Medical Center, and Hospital management Associates, Inc., Defendants", No. 1:05-CV-2184, November 14, 2007, U.S. Dist. LEXIS 84294
- ³ "United States of America ex rel. Ted D. Kosenske, M.D., Plaintiff v. Carlisle HMA, Inc., Carlisle Regional Surgery Center, Carlisle Regional Medical Center, and Hospital management Associates, Inc., Defendants", No. 1:05-CV-2184, November 14, 2007, U.S. Dist. LEXIS 84294
- ⁴ "United States of America ex rel. Ted D. Kosenske, M.D. v. Carlisle HMA, Inc.; health management Associates, Inc., Ted D. Kosenske, M.D., Appellant", No. 07-4616, January 21, 2009, 554 F.3d 88; 2009 U.S. App. LEXIS 971; "United States of America ex rel. Ted D. Kosenske, M.D., Plaintiff v. Carlisle HMA, Inc., Carlisle Regional Surgery Center, Carlisle Regional Medical Center, and Hospital management Associates, Inc., Defendants", No. 1:05-CV-2184, November 14, 2007, U.S. Dist. LEXIS 84294



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