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14 NEW JERSEY HEALTH CARE PROVIDERS ARRESTED, CHARGED WITH TAKING CASH PAYMENTS FOR PATIENT REFERRALS

On December 13, 2011, the Department of Justice (DOJ) arrested and charged a nurse practitioner in a cash for tests referral scheme for allegedly taking illegal kickback payments to refer patients to an Orange, NJ Medicaid testing facility.

The radiology and diagnostic facility Orange Community MRI ("OCM") allegedly paid monthly cash kickbacks in exchange for their referral of Medicare and Medicaid patients to OCM for testing services. The Department of Health and Human Services' Office of Inspector General ("OIG") obtained a cooperating witness at OCM as part of their investigation and the process documented in the criminal complaint was as follows:

"At the end of each month, individuals acting on behalf of OCM printed patient reports that included the patient name, the dates of service, the referring practitioner, kind of medical insurance billed and the tests performed. These reports were used to tally the number of OCM patients' diagnostic tests referred by each doctor and the type of insurance used and the results of these tallies were used to determine the amount of kickback payment paid by OCM to the healthcare provider."

The agreement between OCM and the provider is alleged to indicate that kickback payments were only made on payments with insurance coverage including Medicare and Medicaid.

The kickback payments were alleged to have been received as cash in white envelopes.

The agreements were allegedly different depending on the providers as to the types of services for which they would be paid.

Over a 2½ month period of investigation, the amounts paid are noted by the DOJ as \$51,500 and details of those payments, the defendants involved and the individual complaints can be found by accessing the following link:

<http://www.justice.gov/usao/nj/Press/files/Orange%20MRI%20News%20Release.html>

Once again, it is mind boggling to see such allegedly blatant inappropriate activity between healthcare providers, but it further emboldens the authorities to increase the scrutiny of all healthcare providers and assign more resources to these tasks.

DOJ ALLOWED TO INTERVENE IN PENNSYLVANIA FALSE CLAIMS ACT ACTION ALLEGING STARK AND ANTI-KICKBACK VIOLATIONS

A U.S. Court in Pennsylvania recently ruled that the Department of Justice (DOJ) could intervene in a qui tam action under the False Claims Act (FCA) alleging that a medical center's equipment sublease with two physicians and their practice group violated the Stark Law and the Anti-Kickback Statute. In November 2010, the U.S. District court for the Western District of Pennsylvania held that an arrangement between Bradford Regional Medical Center (BRMC), an acute-care community hospital located in Bradford, PA, and two medical staff physicians and their practice group, violated the Stark Law. BRMC was sued under the FCA by 4 medical staff physicians who turned whistleblowers in this case, alleging that the hospital and the 2 accused medical staff physicians submitted false claims stemming from referrals that violated the Stark Law and the Anti-Kickback Statute.

To briefly review the facts of the case, the 2 accused medical staff physicians were key hospital referral sources and partners in a group practice, ordering more than 40% of the nuclear studies at BRMC. The 2 physicians then leased a nuclear camera from a medical device manufacturer and started performing tests in their own practice instead of the hospital. The Chief Executive Officer of BRMC informed the 2 physicians they could lose their hospital privileges, and in response, the 2 physicians engaged legal counsel to warn BRMC that such action may violate the Anti-Kickback Statute. To resolve the matter, BRMC and the 2 physicians entered into an arrangement whereby the hospital subleased the nuclear camera from the physicians and

provided nuclear studies to hospital patients. This arrangement included both a payment of approximately \$6,500 per month to cover the lease payment for the medical device and a payment of approximately \$23,500 per month to the 2 physicians for other considerations, including a non-compete covenant for nuclear imaging.

The whistleblowers in this case asked the U.S. District Court for the Western District of Pennsylvania for a summary judgment ruling against the defendants. While the court did rule in November 2010 that this arrangement "took into account" referrals and violated Stark Law, it was unable at the summary judgment stage to conclude as a matter of law that the defendants "knowingly and willfully" paid and received remuneration under the sublease and other arrangements for referrals of services in violation of the Anti-Kickback Statute (AKS), saying this determination must be left to the fact finder.

Following this partial summary judgment, on November 1, 2011, the DOJ filed a motion to intervene in this case, noting that the whistleblowers would recover nothing if a jury were to find that the defendants lacked the necessary "knowledge" under the FCA. The DOJ's motion sought permission to assert common law claims against the defendants for payment by mistake and unjust enrichment, arguing that because these claims, "do not require a showing of the Defendants' knowledge, [the] Defendants might never be required to repay the United States for the payments illegally obtained from federal health care programs in violation of the Stark Act." In its motion, the DOJ also cited the partial summary judgment by the U.S. District Court as, "a significant change in circumstances that caused the government to reevaluate its original decision to decline intervention in the FCA portion of this case". The DOJ's motion to intervene was granted by the U.S. District Court on November 2, 2011.

This case illustrates the complex and unpredictable nature of legal actions brought against healthcare providers for alleged violations of the Stark Law and Anti-Kickback Statute. The government initially elected not to participate against the defendants in the FCA portion of this legal action and then, later, decided to intervene based on developments in the case, which is likely to provide a significant advantage to the whistleblowers. Hospitals and health systems can look to this case as an

example of the arduous litigation process that frequently results in the healthcare arena, which rigorous compliance and monitoring efforts should strive to avoid.

FTC COMMISSIONER COMMENTS ON ACCOUNTABLE CARE ORGANIZATIONS

In a November 17, 2011, speech before the American Bar Association Section of Antitrust Law, the Commissioner of the Federal Trade Commission, Thomas J. Rosch, expressed considerable uncertainty regarding Accountable Care Organizations (ACOs) and the Medicare Shared Savings Program, stating that the model could result in higher costs and lower quality care outcomes. Mr. Rosch cited the results of the Physician Group Practice Demonstration, a project which has been viewed as a trial run of the ACO program, stating that, "even after 5 years of the project, a majority of the participating practice groups did not achieve any cost savings". He also stated that for the practice groups in this program that did achieve cost savings targets, "CMS acknowledged that the reduction in Medicare expenditures at these practice groups might have occurred even absent the financial incentives of the project".

Mr. Rosch also stated his concerns over the possibility that healthcare providers may form ACOs not in the spirit of collaborating to improve healthcare, but, rather, to gain market share. "Against the very meager prospects of cost savings, there is a very real risk that some ACOs will be formed with an eye toward creating or exercising market power. The net result of the Shared Savings Program may, therefore, be higher costs and lower quality health care - precisely the opposite of its goal", says Mr. Rosch.

While many government officials have commented on the prospects for ACOs with varying opinions on their potential for success, these comments by a high-ranking official such as Mr. Roach are noteworthy. As the regulatory environment surrounding these models continues to develop, it is valuable to consider input from some of the parties who may influence the changes ahead.

NOTE: FOR ADDITIONAL INFORMATION AND RESOURCES MAKE SURE YOU CHECK OUT OUR NEW WEBSITE: <http://www.baratzcpa.com>

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