

EXCLUSIVE CONTRACTS BETWEEN HOSPITALS AND PHYSICIANS
UNDER INCREASED SCRUTINY AFTER DECISION BY FEDERAL APPEALS COURT

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The Third Circuit Court of Appeals has found that an exclusive contract arrangement between an anesthesiology group and a hospital violated both the Stark law and the Federal Anti-Kickback Statute. The contract, written in 1992, had not been updated to address the group's provision of pain management services at the hospital's outpatient facilities, which was added years later. Also, the agreement was based upon a compensation formula negotiated between the hospital and the anesthesiology group. The group argued that it had engaged in arms-length negotiations with the hospital and that, by definition, the compensation formula was at "fair market value." The Third Circuit rejected this argument, finding that the interrelationship between the hospital and the anesthesiology group was such that a negotiated rate could include factors other than simply fair market value – including the value of referrals, now that the anesthesiologists had begun to provide pain management services. The case, *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, was brought under the False Claims act in a *qui tam* suit initiated by a whistleblower who alleged that the hospital had filed claims certifying compliance with Stark and the Anti-Kickback Statute. The case was remanded to the trial court for further adjudication on whether the plaintiff had satisfied the remaining elements necessary to establish a claim under the False Claims Act.

In its written opinion, the court found that the hospital's grant of the exclusive right to practice pain management services at the hospital's facilities and the hospital's provision of free space, equipment and personnel to the group constituted remuneration and a compensation arrangement. The court found that the "stale" and loosely structured agreement between the two parties failed to meet the "personal services exception" under Stark or the Anti-Kickback law's personal services safe harbor.

Also to be noted is the fact that the plaintiff whistleblower in the case was a former member of the anesthesiology group whose contract with the hospital was the subject of the litigation. That physician had since formed his own competing anesthesiology group and then apparently used his knowledge of the arrangement to blow the whistle on his former partners. Also of interest is that the government had declined to intervene in this *qui tam* suit. Nevertheless, the plaintiff pursued the case alone and may eventually be successful. The hospital had also argued that its outpatient facilities held "provider-based" status and as a result the patients treated there were *de facto* patients of the hospital and the anesthesiology group did not actually make any referrals. The court found that this status did not mandate that the anesthesiologists refer all of their clinic patients to the hospital and, thus, their referral of patients to the hospital for diagnostic tests and other treatments came within the Stark definition of a referral.

The case will likely have broad implications and every physician or group involved in a contract with a hospital or other health care entity to provide personal services should carefully review that contract in light of this decision and the court's statement that Stark insists on "the transparency and verifiability that comes from an express agreement reduced to writing and signed by the parties which specifies all of the services to be provided by the physician and all of the remuneration to be received for those services." Many contracts will, at a minimum, need to

be updated to reflect changes in the type or location of services rendered since the agreement was first executed. Others may require reformulation of the compensation provision to meet the court's strict interpretation of Stark's definition of fair market value.

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