

The Key Legal and Risk Areas Facing Hospitals – From Anti-Kickback, False Claims to Stark and Back to Anti Trust

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Hospitals – Key Legal Issues

- I. Key Statutes
- II. Recent Cases and Enforcement Actions
- III. Core Guidance

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- I. Hospitals – Key Statutes
- 1) Stark Law – common areas of interest (42 U.S.C. § 1395nn, et. seq.)
 - a) Employment and part time employment
 - b) Call Coverage
 - c) Joint Ventures
 - d) Co-Management - Gain Sharing
 - e) Acquisitions of practices
 - f) Technical, e.g., not in writing
 - g) To self report or not
 - h) Special ancillary arrangements
 - i) Medical directorships

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- 2) Anti-Kickback Statute – Intent based (42 USC § 1320a-7b, et. seq.)
- 3) The False Claims Act (31 U.S.C. § 3729-3733)
 - a) Based on Anti-Kickback Statute or Stark violations
- 4) HIPAA & HITECH Act– Privacy and Data Security (Pub. L. No. 104-191 & Title XIII of Pub. L. 111-5)
- 5) Anti Trust (Sherman Act, Clayton Act, and FTC Act)
 - a) Acquisitions – Hospital and/or Practices
 - b) IPAs, ACOs and new managed care models
 - c) Joint Ventures

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II. Cases

A. Stark, Anti-Kickback, and False Claims

- i. December 2010: Detroit Medical Center – \$30 mm settlement resulting from self-disclosure
 - a) Office leases and independent contractor arrangements: Not FMV or not in writing
 - b) Improper perks: special compensation, tickets and incidentals
- ii. April 2013: Intermountain Health Care Inc. – \$25.5 mm settlement resulting from self-disclosure
 - a) Physician bonuses related to value of referrals
 - b) Office leases that were not FMV or not in writing
 - c) Compensation arrangements with more than 170 referring physicians that were not in writing

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II. Cases

A. Stark, Anti-Kickback, and False Claims - continued

- iii. August 2012: Memorial Health Care System – \$1.28 mm settlement resulting from self-disclosure and whistle-blower action by employee
 - a) Time share leases with referring physicians and practices were not FMV; improper prorating of staff support and supply costs
 - b) Free use of hospital storage closet for 20 years
- iv. January 2013: Cooper Health System – \$10,269,000 to U.S. and \$2,331,000 to New Jersey resulting from whistle-blower action by physician
 - a) Payments to referring cardiologists disguised as a consulting fee

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II. Cases

A. Stark, Anti-Kickback, and False Claims - continued

- v. March 2010: Christiana Care Health System – \$3.3 mm settlement resulting from whistle-blower action by competing physicians
 - a) overpaid neurologists for in-hospital readings of EEGs
- vi. March 2010: Tuomey Hospital – \$44.9 mm court ordered payment to Medicare resulting from whistle-blower action by a physician
 - a) Part time employment agreements with referring physicians; not FMV, not commercially reasonable, and took into account referrals
- vii. January 2012: Bristol Hospital – \$157,830 settlement
 - a) Free use of medical office suite by physician practice for over 3 years McGuireWoods LLP 17

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II. Cases

A. Stark, Anti-Kickback, and False Claims - continued

- viii. May 2010: Health Alliance of Greater Cincinnati – \$108 mm settlement resulting from whistle-blower action by cardiologist
 - a) Payments to cardiologists in exchange for referrals
 - b) Hospital scheduled cardiologists at its diagnostic unit based on referrals
- ix. July 2010: United Prostate Centers – \$7.3 mm settlement and CIA resulting from
 - a) Under arrangements contracts with hospitals for lithotripsy and laser services and equipment
- x. November 2010: St. Joseph's Medical Center – \$22 mm settlement and CIA resulting whistle-blower action by competing cardiologists
 - a) Professional services arrangements with cardiology group; non-FMV payments for services not rendered McGuireWoods LLP 18

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II. Cases

B. Anti Trust

- i. March 2012: ProMedica Health System
 - a) Acquisition of competing hospital
 - b) Already owned several Toledo-area hospitals
- ii. August 2012: Renown Health
 - a) Cornering the market – like the Bass Brothers for silver
 - b) Acquisitions of the 2 largest cardiology groups in the Reno, NV region → 88% of market
 - c) Top leadership dismissed
 - d) Paid \$4.2 mm to cardiology group and release of physicians from non competes McGuireWoods LLP 19

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II. Cases

B. Anti Trust

iii. February 2013: Phoebe Putney Health System

- a) Acquisition of competing hospital → 86% of market for acute-care services

iv. April 2013: St. Luke's Health System

- a) Acquisition of physician group; making St. Luke's the largest provider of adult primary care services in Nampa, Idaho area
- b) Trial date is set for September 16, 2013

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II. Enforcement Actions

C. HIPAA and HITECH Act

i. February 2011: Massachusetts General – \$1 mm settlement

- a) Loss of documents from hospital's outpatient practice that included PHI for 192 patients

ii. July 2011: UCLA Health System – \$865,500 settlement

- a) Unauthorized access to PHI of celebrity patients

iii. September 2012: Massachusetts Eye and Ear – \$1.5 mm settlement

- a) Theft of unencrypted laptop; prescriptions and clinical information for 3,621 patients

iv. January 2013: Hospice of Northern Idaho – \$50,000 settlement

- a) Theft of unencrypted laptop; less than 500 patients' ePHI

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III. Core Guidance

1) Comprehensive Compliance Plans

- a) Conform to OIG 7 Elements
- b) Rollout
- c) Education

2) A Culture of Compliance

3) Technical Compliance

4) Contract Checklist File

- a) Fair Market Value – External and Internal review
- b) Check the exceptions-Stark Law, Safe Harbors, etc.
- c) Commercially reasonable review
- d) Approval process

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III. Core Guidance - continued

- 5) Regular Audit Efforts
 - a) Review all physician financial relationships
 - b) Audit coding and billing
 - c) HIPAA-HITECH Act Audit Protocol

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Questions or Comments?

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