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Practice Group:  
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## Bonuses for Physician Employees: Lessons Learned from the Halifax Hospital Case

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This week, a federal district court in Florida concluded that a hospital violated Stark as a matter of law by entering into employment agreements with physicians that included bonus compensation that was not based exclusively on personally performed services.<sup>1</sup> Specifically, the court held that a bonus pool consisting of a percentage of net profit from the physicians' medical oncology service line at the hospital took into account the volume or value of their referrals in violation of federal law.

### Background Law

Briefly, the Stark Law prohibits physicians from referring Medicare patients to entities with which the physician or a family member has a financial interest, unless an exception to the law applies.<sup>2</sup> The prohibition applies to referrals for "designated health services," defined to include inpatient and outpatient hospital services and outpatient prescription drugs, among other things. If the Stark Law applies and the relationship is not protected by an exception, Medicare will not pay for any services referred by the physician, and any claims paid during the term of the noncompliant relationship must be refunded. A Stark Law violation can also give rise to a False Claims Act case,<sup>3</sup> under the theory that the health care entity falsely certified its compliance with law under its Medicare provider agreement.<sup>4</sup>

### Facts

Halifax Hospital Medical Center operates a community hospital in Volusia County, Florida, and employs physicians through its affiliate Halifax Staffing, Inc. (collectively, "Halifax"). In fiscal year 2005, Halifax entered into employment agreements with six medical oncologists that included a bonus component. The bonus compensation pool was made up of 15 percent of the "operating margin" (revenue minus expenses) of the whole hospital medical oncology program. Halifax admitted that the pool included revenue from services not personally performed by the physicians, such as fees for the administration of chemotherapy that would constitute designated health services under Stark. Each of the six physicians received a share of the pool based on his or her personally performed services compared to the total services personally performed by all six medical oncologists. Note that the physicians were not part of an arrangement that would be considered a group practice under Stark.

<sup>1</sup> *U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002-Orl-31TBS (M.D. Fla. filed Nov. 13, 2013). This case was brought by a *qui tam* relator, and the government intervened. The holding described in this Alert only addresses the claims the government put forth in its motion for summary judgment.

<sup>2</sup> 42 U.S.C. § 1395nn.

<sup>3</sup> 31 U.S.C. § 3729 *et seq.*

<sup>4</sup> Citing *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88 (3d Cir. 2009), the court here stated "Falsely certifying compliance with the Stark Law in connection with a claim submitted to a federally funded insurance program is actionable under [the False Claims Act]."

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### Summary Judgment

Without a hearing, the Orlando Division of the Middle District of Florida (the “Court”) granted summary judgment to the government on the existence of a Stark law violation, though the Court also held that there was a genuine issue of material fact remaining as to the amount of the damages.

The parties agreed that the Stark Law applied to this financial relationship between Halifax and the medical oncologists. However, Halifax argued that the relationship was protected by the Stark exception for bona fide employment arrangements.<sup>5</sup> One requirement of this exception is that the employee’s compensation cannot be determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the physician.<sup>6</sup> The regulation does, however, permit a productivity bonus based on services personally performed by the physician.<sup>7</sup>

The Court noted that Halifax’s bonus pool, calculated as 15 percent of the operating margin, included revenue from services referred by the physicians that were not personally performed and concluded that “additional referrals would be expected to increase the size of the pool.”<sup>8</sup> The fact that the pool was divided based on each physician’s percentage of personally performed services did not change the Court’s conclusion: “the fact that each oncologist could increase his or her share of the bonus pool by personally performing more services cannot alter the fact that the size of the pool (and thus the size of each oncologist’s bonus) could be increased by making more referrals.”<sup>9</sup> Thus, according to the Court, the arrangement was not protected by the employment exception and was illegal as a matter of law.

With the Court determining that Stark prohibited the physicians from referring Medicare patients to the hospital, Halifax argued that the government had not proven that the physicians had made any such referrals. The government’s consultant had calculated the referrals using Medicare claim forms on which the oncologists were listed as either the attending or operating physician during the relevant period. Using this approach, the government ultimately calculated the tainted claims as totaling over \$27 million.<sup>10</sup>

Halifax argued that the government had not proven the number of referrals because an oncologist may have been listed on the claim form without having actually referred the patient for services. Therefore, Halifax contended that the only way to determine the identity of the referring physician was to review each patient’s medical record, which had not been done. As a result, the Court held that there was a genuine issue of material fact as to the amount of damages, precluding summary judgment on the extent of the Stark violation, and

<sup>5</sup> Halifax also argued in the alternative that the relationship was only an indirect arrangement, since the physicians were employed through Halifax Staffing, Inc. rather than directly with Halifax Hospital Medical Center. However, the Court concluded that under either theory, the compensation could not take into account the volume or value of referrals, so the disputed issue was the same under either theory.

<sup>6</sup> 42 U.S.C. § 1395nn(e)(2).

<sup>7</sup> 42 C.F.R. § 411.357(c)(4).

<sup>8</sup> *Halifax Hosp.*, slip op. at 15-16.

<sup>9</sup> *Id.* at 16-17.

<sup>10</sup> The government’s original calculation was over \$34 million, which it agreed to adjust downward based on certain objections by Halifax for purposes of its motion for summary judgment. Furthermore, although the Court had previously left open the possibility that Medicaid payments might also be prohibited by Stark, this amount only included Medicare claims. *But see, supra*, note 4.

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consequently on the government's other claims under the False Claims Act and various equitable theories.

### Key Lessons

Although the Stark Law is highly technical and typically requires a fact-specific analysis, the Court in this case was willing to hold that the hospital violated Stark as a matter of law at the summary judgment stage. As a result, health care providers that are subject to Stark should review their compensation arrangements with physicians, even if such physicians are employed through a subsidiary entity. Providers should also be aware that, although the employment exception is generally easier to satisfy than other exceptions, the government will still closely scrutinize employment arrangements. In addition, providers should stay tuned for the outcome of this case in terms of the ultimate amount of damages, which may affect how referrals should be calculated for purposes of a Stark Law settlement.

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