

Stark Law Liability on the Rise: How to Spot Suspect Physician Compensation Arrangements

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A recent settlement agreement serves as a reminder that significant liability can still stem from a violation of the federal Physician Self-Referral Law¹ (Stark law).² In December 2023, Community Health Network Inc. (CHN), an Indianapolis-based integrated health care system, agreed to a \$345 million settlement with the Department of Justice (DOJ) to resolve allegations under the False Claims Act related to employment compensation structures alleged to be above fair market value (FMV).³ The reminder, therefore, is that as hospitals continue to employ physicians, compensation arrangements must be carefully reviewed to ensure FMV so to provide evidence that such arrangements do not “take into account” the value or volume of referrals.

Avoiding Above FMV Compensation and Arrangements that “Take Into Account” the Value or Volume of Referrals

The Stark law bona fide employment exception permits employment arrangements between hospitals and physicians only if they comply with the following:

- (1) The employment is for identifiable services.
- (2) The amount of the remuneration under the employment is—
 - (i) Consistent with the fair market value of the services; and
 - (ii) Except as provided in paragraph (c)(4) of this section, is not determined in any manner that takes into account the volume or value of referrals by the referring physician.
- (3) The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer.
- (4) Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician).
- (5) If remuneration to the physician is conditioned on the physician's referrals to a particular provider, practitioner, or supplier, the arrangement satisfies the conditions of § 411.354(d)(4).⁴

The key provisions of the exception touched upon in the CHN Settlement are the two subpoints under the second requirement—that the arrangement reflects FMV and that it does not “take into account” the volume or value of referrals.

Examining Notable Stark Law Settlements

There have been many notable Stark law cases and settlements dealing with physician employment compensation arrangements. The government has used specific facts in each of those situations to argue that when the compensation did not reflect FMV, it did “take into account” the volume or value of referrals. Some of the facts include:

- In *Bradford* (2010), which settled for \$2.7 million,⁵ the excessive compensation was alleged to consider “the amount of business [the hospital] would receive from the doctors’” nuclear camera referrals and the revenue the hospital “had lost, and stood to continue to lose.”⁶
- In *Halifax* (2014), which settled for \$85 million,⁷ the hospital was alleged to have paid financial incentives for the value of prescription drugs and tests that the physicians did not personally perform.⁸ It also paid certain physicians above FMV for admitting patients “despite an absence of medical necessity for such admission.”⁹
- In *Tuomey* (2015), which settled for \$72.4 million (to resolve a \$237 million judgment),¹⁰ the employment arrangements were part time and only dealt with surgeries.¹¹
- In *Adventist* (2015), which settled for \$115 million, the arrangement “allegedly paid doctors’ bonuses based on the number of tests and procedures they ordered.”¹²
- In *Beaumont* (2018), which settled for \$84.5 million,¹³ certain physicians were full-time, salaried employees but were “allowed to maintain a private practice and keep remuneration from that private practice.”¹⁴

Last year saw this trend continue:

- In May 2023, a Boston hospital and physician group settled allegations relating to the Stark law for \$5.7 million.¹⁵ The facts giving rise to the settlement involved the practice paying a portion of fees received from an affiliated hospital (i.e., a percentage of the hospital’s operating margin from facility fees) as a bonus to its physicians.¹⁶
- In June, St. Francis Health system agreed to pay \$36.5 million to resolve allegations it violated the Stark law by paying bonuses to orthopedic physicians that “incentivized and rewarded the physicians for generating referrals to the hospital system for physical therapy, laboratory, radiology, and other ancillary services.”¹⁷
- In October, a Florida cardiac imaging company agreed to pay \$85.48 million to settle allegations it paid “referring cardiologists . . . above-[FMV] . . . to supervise [] PET scans.¹⁸ It was alleged that the fees exceeded FMV because the company paid the cardiologists for each hour spent scanning patients, “including time the cardiologists were away from [the] mobile scanning units”¹⁹

Examining the Largest Stark Law Settlement in History: CHN’s \$345 Million Settlement in 2023

In 2008, CHN began recruiting and paying physician specialists (e.g., breast surgeons, cardiovascular specialists, and neurosurgeons) compensation that was alleged to be significantly higher than FMV. Despite unfavorable valuation opinions from three different valuation firms, CHN’s compensation committee approved the compensation structures to prevent “leakage” (referrals) of physicians to CHN’s competitors.²⁰

Not only did CHN “opinion shop,” the complaint alleged that it went a step further by providing false information²¹ to the valuation firms to induce a more favorable valuation. Likewise, an internal communication between the CEO and CFO specifically stated that the cardiologists would be paid a rate “10% higher” because they would bring in more “outpatient technical net revenues.”²² Considering the whistleblower’s (the CFO) use of internal documents and communications, this settlement underscores the need for a diligent paper trail when negotiating physician compensation arrangements. This may, for example, include documenting: the board minutes discussing the arrangements, any valuation opinions, and communications related to said documentation and arrangements.

CHN’s conduct resulted in the largest Stark law settlement to this point and the imposition of significant oversight by the Department of Health and Human Services Office of Inspector General (OIG) in the Corporate Integrity Agreement (CIA), requiring both an Independent Review Organization and the appointment of a Chief Compliance Officer. This was an extremely rare measure required by the government in this settlement.²³ Only one other—the *Halifax* case—imposed such a measure.

Summing it Up

First, in order to fit within the applicable Stark exceptions, caution must be taken when operating within the applicable exception to ensure that each element of the exception is met. Second, CMS has specifically stated that just because compensation is at or below the 75th percentile does not mean it is compliant, and higher than the 75th percentile is not necessarily suspect, so compensation should be determined based on a multi-factor approach and periodically re-evaluated. Third, hospitals may want to consider more thorough documentation when entering these arrangements, including why certain physicians warrant higher compensation. The bottom line is that FMV determinations can be difficult and complex, so learning from past mistakes is essential to reduce the risk of Stark law liability moving forward.

¹ 42 U.S.C. § 1395nn, prohibits a hospital from submitting Medicare claims based on patient referrals from physicians having certain kinds of financial relationships with the hospital, such as an ownership interest, that might improperly influence the physicians’ medical judgment.

² Settlement Agreement, *U.S. and the State of Indiana ex rel. Thomas Fischer v. Community Health Network, Inc., et al.*, No. 1:14-cv-1215 (S.D. Ind.), available at: <https://www.justice.gov/opa/media/1329621/dl?inline> (last accessed on March 28, 2024).

³ U.S. Department of Justice, Office of Public Affairs, “*Indiana Health Network Agrees to Pay \$345 Million to Settle Alleged False Claims Act Violations*,” December 19, 2023, available at: <https://www.justice.gov/opa/pr/indiana-health-network-agrees-pay-345-million-settle-alleged-false-claims-act-violations> (last accessed on March 28, 2024).

⁴ 42 C.F.R. § 411.357(c)(1)-(5).

⁵ U.S. Department of Justice, Office of Public Affairs, “*Upper Allegheny Health System, on Behalf of Bradford (Pennsylvania) Regional Medical Centers and Other New York Dental Clinics, to Pay \$2.7 Million to Settle False Claims Act Allegations*,” May 28, 2021, available at: <https://www.justice.gov/usao-wdpa/pr/upper-allegheny-health-system-behalf-bradford-pennsylvania-regional-medical-centers-and> (last accessed on March 28, 2024).

⁶ *U.S. ex rel. Singh v. Bradford Reg’l Med. Ctr.*, 752 F. Supp. 2d 602, 641 (W.D. Pa. 2010).

⁷ U.S. Department of Justice, Office of Public Affairs, “*Florida Hospital System Agrees to Pay the Government \$85 Million to Settle Allegations of Improper Financial Relationships with Referring Physicians*,” news release, March 11, 2014, available at: <https://www.justice.gov/opa/pr/florida-hospital-system-agrees-pay-government-85-million-settle-allegations-improper> (last accessed on March 28, 2024).

⁸ *U.S. v. Halifax Hosp. Med. Ctr.*, No. 6:09-CV-1002-ORL-31, 2013 WL 6017329, at *8 (M.D. Fla. Nov. 13, 2013).

⁹ *U.S. v. Halifax Hosp. Med. Ctr.*, No. 6:09-CV-1002-ORL-31, 2014 WL 68603, at *7 (M.D. Fla. Jan. 8, 2014).

¹⁰ U.S. Department of Justice, Office of Public Affairs, “*United States Resolves \$237 Million False Claims Act Judgment against South Carolina Hospital that Made Illegal Payments to Referring Physicians*,” news release, October 16, 2015, available at: <https://www.justice.gov/opa/pr/united-states-resolves-237-million-false-claims-act-judgment-against-south-carolina-hospital> (last accessed on March 28, 2024).

¹¹ *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 371 (4th Cir. 2015).

¹² U.S. Department of Justice, Office of Public Affairs, “*Adventist Health System Agrees to Pay \$115 Million to Settle False Claims Act Allegations*,” September 21, 2015, available at: <https://www.justice.gov/opa/pr/adventist-health-system-agrees-pay-115-million-settle-false-claims-act-allegations> (last accessed on March 28, 2024).

¹³ U.S. Department of Justice, Office of Public Affairs, “*Detroit Area Hospital System to Pay \$84.5 Million to Settle False Claims Act Allegations Arising From Improper Payments to Referring Physicians*,” August 2, 2018, available at: <https://www.justice.gov/opa/pr/detroit-area-hospital-system-pay-845-million-settle-false-claims-act-allegations-arising> (last accessed on March 28, 2024).

¹⁴ Complaint, *United States and the State of Michigan ex rel. David Felten, v. William Beaumont Hospitals, et al.*, No. 2:10-cv-13440 (E.D. Mich.) (Aug. 30, 2010), available at: <https://images.law.com/contrib/content/uploads/documents/404/17483/EDMich-Felton-v-Beaumont-Hospital-FCA-complaint.pdf> (last accessed on March 28, 2024).

¹⁵ U.S. Department of Justice, Office of Public Affairs, “*Massachusetts Eye and Ear Agrees to Pay Over \$5.7 Million to Resolve False Claims Act Allegations*,” (May 24, 2023), available at: <https://www.justice.gov/usao-ma/pr/massachusetts-eye-and-ear-agrees-pay-over-57-million-resolve-false-claims-act> (last accessed on March 28, 2024).

¹⁶ Settlement Agreement, *U.S. ex rel. John Doe v. Massachusetts Eye and Ear Infirmary, Massachusetts Eye and Ear Associates, Inc., and Foundation of the Massachusetts Eye and Ear Infirmary, Inc.*, 18-cv-12179 (D. Mass. May 11, 2023), available at: https://www.justice.gov/d9/2023-05/us_v_massachusetts_eye_and_ear_settlement_agreement.pdf (last accessed on March 28, 2024).

¹⁷ Complaint, *U.S. ex rel. and Daniel E. Lee v. Bon Secours St. Francis Health System, St. Francis Hospital and St. Francis Physician Services, et al.*, 6:18-cv-01932 (D. S.C. July 16, 2018), available at:

https://d6jxgaftxvagq.cloudfront.net/Uploads/p/t/x/st.franciscomplaint_155270.pdf (last accessed on March 28, 2024). See

also U.S. Department of Justice, Office of Public Affairs, “*St. Francis to Pay the United States \$36.5 Million to Settle Allegations Under the False Claims Act*,” (June 15, 2023), available at: <https://www.justice.gov/usao-sc/pr/st-francis-pay-united-states-365-million-settle-allegations-under-false-claims-act> (last accessed on March 28, 2024).

¹⁸ U.S. Department of Justice, Office of Public Affairs, “*Mobile Cardiac PET Scan Provider and Founder to Pay \$85 Million to Resolve Allegedly Unlawful Payments to Referring Doctors*,” (October 10, 2023), available at: <https://www.justice.gov/opa/pr/mobile-cardiac-pet-scan-provider-and-founder-pay-85-million-resolve-allegedly-unlawful> (last accessed on March 28, 2024).

¹⁹ *Id.*

²⁰ Complaint in Intervention, *U.S. and the State of Indiana ex rel. Thomas Fischer v. Community Health Network, Inc., et al.*, No. 1:14-cv-1215-RLY-DLP (S.D. Ind. Jan. 1, 2020), available at: <https://www.justice.gov/opa/media/1329616/dl?inline=> (last accessed on March 28, 2024).

²¹ See *Id.* (The DOJ alleged that “CHN falsely inflated the \$4,801,000 collections for personally performed professional services figure upon which Sullivan Cotter had based its favorable opinion.” The collections number was false because CHN allegedly failed to subtract \$1.3 million in collections from “technical services, such as the technical component of radiology services that they performed in their practice. . . . Had CHN backed out the approximately \$1,300,000 of collections of technical services from the \$4,801,000 figure, Sullivan Cotter would have not have concluded that the proposed compensation “falls within the bounds of FMV.”).

²² See *Id.* (“[The CEO] explained that the ‘10% premium’ was based in part on the fact that the cardiologists ‘account for 93% of the CV NewCo outpatient technical net revenues that finance the increase in the CV Physician compensation’ while the vascular surgeons account for merely 7% of those revenues.”).

²³ Settlement Agreement, *U.S. and the State of Indiana ex rel. Thomas Fischer v. Community Health Network, Inc., et al.*, No. 1:14-cv-1215 (S.D. Ind. Dec. 15, 2023), available at: <https://www.justice.gov/opa/media/1329621/dl?inline=> (last accessed on March 28, 2024).