Hospital–Physician Joint Ventures Under the Stark Law Revisions
Restructuring or Unwinding “Under Arrangements” and "Per Click" Leases

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
Donald H. Romano, Partner, Arent Fox, Washington, D.C.
Lisa M. Ohrin, Partner, Sonnenschein Nath & Rosenthal, Washington, D.C.
Ann DesRuisseaux, Principal, GlobalComplianceStrategies.com, Dallas

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The conference begins at:
1 pm Eastern
12 pm Central
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Restructuring Hospital – Physician Relationships Due to Recent Stark Changes

Lisa Ohrin
Sonnenschein Nath & Rosenthal
Washington, DC
(202) 408-9129
lohrin@sonnenschein.com

Donald Romano
Arent Fox LLP
Washington, DC
(202) 715-8407
romano.donald@arentfox.com

Ann DesRuisseaux
Dallas, TX
(214) 264-1826
ann@globalcompliancestrategies.com
Stark Law Basic Prohibition

• If a physician (or an immediate family member of a physician) has a financial relationship with an “entity”:
  – Physician: may not refer to the entity for the “furnishing” of “designated health services” (DHS) for which payment otherwise may be made under Medicare
  – Entity: may not present or cause to be presented a claim under Medicare or bill to any individual, third party payor, or other entity for DHS furnished pursuant to a prohibited referral

• Unless an exception applies to protect arrangement:
  – Compensation
  – Investment/ownership
  – Both
Changes in FY 2009 IPPS Final rule:

1. Revised Definition of “Entity”

- Effective Date: October 1, 2009
- CMS revised the definition of “entity” at §411.351
  - Prior to October 1, 2009, a person or entity is considered to be “furnishing” DHS if it is the person/entity to which CMS makes payment
  - New rule – “Furnishing DHS” also includes performing the service billed as DHS
    - Both parties to an arrangement may be considered an “entity” if one party performs the DHS and the other party bills for the DHS
- Why the change? To address potentially abusive “under arrangements” deals that hold hospitals hostage
Changes in FY 2009 IPPS Final rule:

1. Revised Definition of “Entity”

• CMS Guidance Regarding Definition of “Entity”
  – No regulatory definition of “performs the service”
    • Example: a service is “performed” if the entity provides medical service and could bill for the service but contracts with a provider and that provider bills for service instead
  – However, entity does not “perform” DHS, if only:
    • Leases or sells space/equipment
    • Furnishes supplies
    • Provides management or billing services; or
    • Provides personnel
  – CMS has received requests for FAQs
Changes in FY 2009 IPPS Final rule:

1. Revised Definition of “Entity”

• Impact of Revised Definition of “Entity
  – As of October 1, 2009, the physician owner of an entity furnishing DHS “under arrangements” (but not billing for those services) may have an ownership interest in a DHS entity that does not meet an exception
  – Unless the arrangement qualifies under exception such as:
    • Rural ownership exception
    • Publicly-traded company
    • Personally provided physician services
    • In-office ancillary services provided by group practice
Changes in FY 2009 IPPS Final rule:

2. Stand In The Shoes

• Effective October 1, 2008
• A physician who has ownership/investment interest in physician organization (“PO”) is deemed to stand in the shoes of the PO
• Deemed to have the same compensation arrangements (with the same parties and on the same terms) as the PO
• Exception: titular ownership (no ability or right to receive the financial benefits of ownership / investment)
• Does not finalize proposed DHS SITS
Basic “Under Arrangements” Structure

Referrals for “hospital” services

“hospital patient” sent to Service Provider

Billed as I/P or O/P hospital service

Medicare
Hypothetical 1

- Hospital and LLC have an exclusive contract for LLC to provide cardiac cath services “under arrangement”
- Physician A is a contractor for LLC and has a lease with Hospital
- Physician B is an owner of LLC
Pre- 10/09

**Physician A**

**Physician B**

**Hospital DHS Entity**

**LLC**

Not DHS Entity

Lease

PSA

Exclusive contract

Owner
Post- 10/09

Physician A

Hospital DHS Entity

Physician B

LLC DHS Entity

Lease

PSA

Exclusive contract

Owner
Analysis of Physician A Referral

1. PSA must meet personal services exception
2. Lease (either direct or through Physician A’s practice) must meet the exception for rental of office space
Analysis of Physician B Referral

1. Ownership interest must meet an ownership exception (any compensation arrangement must also meet an exception)
2. Exclusive contract must meet the personal services exception (“stand in the shoes” as owner)
Post- 10/09

Ownership must meet exception

 Lease

Exclusive contract

Physician A

Physician B

Hospital DHS Entity

LLC
DHS Entity

PSA
Q: Are Physician B’s referrals for other services performed and billed by Hospital tainted by the prohibited cardiac cath referrals performed by LLC?
Hypothetical 1 v.3 (Rural Provider)

- Hospital is located just inside the Portland Maine MSA
- LLC is located just outside the MSA
- 80% or more of patients reside outside the MSA
- Questions:
  - Does Physician B’s ownership in LLC meet an ownership exception?
    - Rural provider: “an entity that furnishes substantially all (not less than 75%) of the DHS that it furnishes to rural area residents.”
  - Does is matter that the services are billed by Hospital, which is not located in a rural area?
Changes in FY 2009 IPPS Final rule:
3. Percentage-Based Compensation

• Effective Date: October 1, 2009
• Amends four compensation exceptions:
  – Rental of office space
  – Rental of equipment
  – Fair market value compensation arrangements
  – Indirect compensation arrangements exceptions
• Charges may not be determined using a formula based on % revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space or through the use of the equipment.
Changes in FY 2009 IPPS Final rule:
4. Per-click Compensation

- Effective Date: October 1, 2009
- Amends four compensation exceptions:
  - Office space lease arrangements
  - Equipment lease arrangements
  - Fair market value compensation arrangements
  - Indirect compensation arrangements
- Rental charges may not be determined using a formula based on per-unit of service provided to patients referred by lessor (either physician or entity) to lessee.
- Block leases ok if not tantamount to per click
Per-click or Percentage-based Lease Arrangement

GP Lessor

Non-owner

Per-click or % equipment lease

Lessee

Owner (SITS)

prohibited if % and fin. rel. w/ hosp.

prohibited if per-click or %
Management Arrangement: Who is the lessor?

According to IPPS preamble, physician owner also deemed to be the lessor
Motley Crew Management Co.
Examines equip., tech, billing and collections services to GP on % basis

Physicians in GP have ownership interest in Management Company

Analysis: 1) Physicians in GP have indirect comp relationship with GP based on their ownership of Management Co. (comp paid to GP is attributed to Physicians, and aggregate comp varies with V&V of referrals); 2) indirect comp exception not met because % lease; 3) referrals may be protected, however, by IOAS
Where does this leave lithotripsy?

- Referral for lithotripsy not a prohibited referral even if there is a percentage comp or per-click lease – but such a lease creates a non-conforming comp relationship so other referrals from physician may be tainted
- Revised definition of entity does not affect (for now) referrals to physician-owned service provider for lithotripsy, so is it better to be considered “performing the service” instead of having a percentage comp or per click lease for lithotripsy?
Lithotripsy

- LLC conducts the TC, using its techs and equipment, for *lithotripsy*
- Physician B (a urologist) owns LLC
CMS FAQ #9556

- Under certain circumstances, a hospital may use a per-use or percentage-based compensation formula to compensate a physician-owned lithotripsy partnership that provides a lithotripter and skilled technician to the hospital on an “under arrangements” basis without violating the physician self-referral law.
  - Must meet rules regarding services provided “under arrangements”
  - Must satisfy the requirements of an applicable exception
  - If merely leasing equipment, partnership is not “performing” the service
Litigation

• *Colorado Heart Institute LLC v. Johnson*, No. 08-1626 (D.D.C.)
  – Challenged revised definition of entity on basis that rule exceeded Secretary’s authority and was inconsistent with the underlying arrangements group practice exception in the statute (1877(e)(7)) and the regulations (411.357(h))
  – Suit dismissed on 4/21/09 for lack of jurisdiction (failure to follow administrative appeals procedures)

  – Challenge to per click rule on basis that rule is inconsistent with Conference Report indicating per click arrangements acceptable
  – Would appear to have the same jurisdictional problems as *Colorado Heart Institute*
Restructuring Options

Consider:

- Divestiture of interest
- Other forms for arrangements
- Do not “perform” services
- Use IOAS or ASC exception
- Circumvention schemes?
Divesting the Physician’s Interest in the “Entity”

• Exception
  – Isolated transaction with installment payments to physician owners/group practice?

• FMV
  – Fire sale?
  – 3rd party valuation necessary
  – Look in original contract for divestiture provisions
Medical Oncologist sees patient and requests consultation from Radiation Oncologist in same GP (referral as defined in 411.351)

Radiation Oncologist “refers” patient to Hospital for Brachytherapy which is performed by GP in space leased from hospital; service is sold to hospital, (not a referral as defined in 411.351)

Radiation Oncology
Do Not “Perform” Services

• Start with the definition of “entity”
• How much do you need to “peel away” so that you are not considered to “perform” the service?
  – Equipment
  – Personnel
  – Disposable (but costly) supplies
• Convert Joint “Services” Venture to Joint “Equipment Leasing” Company
  – Provide equipment only
  – Hospital employs personnel
  – Flat fee compensation formula for equipment lease
Re-Structure for “Less than Performing” a Service

What can JV provide?
- Equipment
- Supplies
- Personnel
- Management

Referrals for Hospital PET Services

Mobile PET JV Entity?
Convert “Services” JV to “Equipment Leasing” JV

Referrals for Hospital PET Services

Lessee

Equipment ONLY
Flat Fee
(NOT % or per-click b/c Dr. considered lessor)

Hospital provides personnel, supplies, management

Mobile PET JV
Can JV lease more than Equipment?

Mobile PET JV Entity?

Referrals for Hospital PET Services

Lessee

Can JV lease space, Equip and Tech if it does not supervise tech?

Hospital contracts with T/P physician to supervise
Does inserting another entity help?

2. Can Hospital contract with owner-physician for supervision?

Referrals for Hospital PET Services

Mobile PET JV Entity?

LLC

1. Can JV lease space, Equip and Tech if it does not supervise tech?

Lessee

Hospital contracts with T/P physician to supervise
Does Splitting “Services” Company into Two Companies Help?

Referrals for Hospital services that will be provided by JVs

NOT per-click or percentage-based payment

Per-service payment

Equipment Leasing JV

Staffing and Supplies JV
What if intervening entity leases?

1. Can Hospital or JV contract with owner-physician for supervision?

2. Can comp be based on % or per-click?

Lease of Space, Equip and Tech

Mobile PET JV

Entity?

Management Company

Entity?

Referrals for Hospital PET Services

Lessee

Contract for PET

3. Can comp be based on % or per-click?
Publicly-traded Company

• If an entity is publicly-traded, a physician may have an ownership interest, even if the company provides services “under arrangements”
• If a publicly-traded company leases space or equipment to a DHS entity, per-click or percentage-based fees that reflect services provided to patients referred by physician owners are still prohibited
• Opportunities for private equity firms?
Ownership in Local Venture of a National Company

• May a physician with an ownership interest in a local joint venture subsidiary of a national company sell his interest in the local company and purchase an interest in a different subsidiary of the same national company to which the physician would not refer?
  – Physician in the other entity does the same
• Risky – possibility that CMS/OIG would consider this a circumvention scheme
Ownership in Local Venture of a National Company

Ownership interest

Referral to Hospital

Ownership interest

Mobile PET Joint Venture

Miami

Mobile PET Joint Venture

Phoenix

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IOAS Alternative

- Service referred to Group personnel is billed by Group as a PFS service
- Group physician and tech perform service in “same building” or centralized building

Medicare $$
Prior to 10/1/09 Surgery Center was JV between Physician group and Hospital and billed Medicare under OPPS. As of 10/1/09 Surgery Center enrolled as an ASC and 100% physician owned.
Conversion of Physician Organization to Nonprofit

- Group Practice has no physician owners
  - No SITS issues
- Compensation arrangements, including services provided “under arrangements,” would be analyzed using the rules for indirect compensation arrangements
  - IF the compensation arrangement meets the definition of “indirect compensation arrangement” in §411.354(c)(3), it must meet exception in §411.357(p) for indirect compensation arrangements
  - Compensation arrangements that do not meet the definition of “indirect compensation arrangement” (and that are not direct compensation arrangements) do not implicate the physician self-referral law
- Is conversion to nonprofit status a circumvention scheme?
Indirect Comp Definition

• Unbroken Chain” of any number of entities between physician and entity
• Aggregate compensation to physician from closest link in chain varies with, or otherwise reflects, volume or value of referrals to entity providing DHS
• Entity providing DHS has actual knowledge or acts in reckless disregard of existence of such relationship
Indirect Comp Exception

• Compensation at fair market value w/o taking into account volume or value of referrals
  Until 10/01/2009-Need not be “set in advance”- Per-use payments permitted even if referrals from physician can effect total units
  Post 10/01/2009-Compensation for space or equipment leases cannot be on a per-click or percentage basis
• Writing, signed by parties, that specifies covered services (not required for employment relationships)
• Does not violate anti-kickback statute or program billing rules
Analyze under Rules Regarding Indirect Compensation Arrangements

Referrals are ONLY to the Hospital for "hospital" services

No ownership interest in Group Practice

Per-use or percentage-based compensation permissible?

FMV compensation under exception for bona fide employment

Group Practice owns the Service Provider
Insertion of an Organization with No Physician Owners in Chain of Financial Relationships

• Many joint ventures include physicians and management company as investors

• Can arrangement be structured so that hospital contracts with an entity owned by management company (no physicians) on per click basis and that entity contracts with physician owned entity for lease of equipment?
  – Okay if lease from physician entity is flat rate
  – Not okay if physician entity leases at per click or percentage
Insertion of an Organization with No Physician Owners in Chain of Financial Relationships

Mobile PET Joint Venture

Per-service compensation is permissible

Flat-fee compensation arrangement

Management and Leasing Company
Contact Information

• Ann DesRuisseaux
  – Ann@globalcompliancestrategies.com
  – (214) 264-1826
• Lisa Ohrin
  – lohrin@sonnenschein.com
  – (202) 408-9129
• Don Romano
  – Romano.donald@arentfox.com
  – (202) 715-8407