PUBLICATION

Lawsuit Based on Kickback, Stark Law Violations Sustained; Civil Suit Offers Additional Option to Counter Competitor's Illegal Arrangements [Ober|Kaler]

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Hospitals, laboratories, and other health care providers that rely on referrals from other health professionals may encounter situations where competitors have entered into arrangements with physicians or other referral sources that are of questionable legality, causing them to refer patients to the competing entity. Faced with such a situation, the provider has various available options.

Non-Litigation Alternatives

Alternatives that do not involve litigation include:

1. A telephone call to the competitor's compliance officer, advising him or her of the noncompliant activities and requesting their termination so that the parties compete on a “level paying field.”
2. A letter demanding that the competitor “cease and desist” from these activities. The letter may imply or expressly state that the competitor's failure to do so could result in further action.
3. Advising the Office of Inspector General (OIG) or other federal or state regulatory agency of the competitor's noncompliant activities (depending upon the particular federal or state statute that is being violated).

Each of these strategies has its advantages and drawbacks. When contacted directly, the competitor may deny engaging in any prohibited conduct (although such conduct may nevertheless be discontinued). Additionally, a government agency may not take any action in response to a competitor complaint, and, if it does pursue the matter, the provider that was the subject of the complaint may assert that the complaining provider engaged in unlawful activities. This could require that provider to defend its own business practices.

Litigation Alternatives

Initiation of litigation may also be an available option. However, the Federal Antikickback Statute (FAS) and self-referral statute (Stark Law) do not provide a private cause of action.1 A private entity cannot initiate a lawsuit against a health care provider under these statutes based on their violation. Payment arrangements that violate the FAS or Stark Law may, however, be the basis for a lawsuit under a different statute or legal theory. It has been recognized generally that a health care provider's submission of a Medicare payment claim for a service that was referred by a physician with an arrangement that violated the FAS or Stark Law could also violate the False Claims Act (FCA). Private persons, including provider entities, can initiate actions under the FCA based on the statute's qui tam provisions. However, FCA actions are complicated, subject to various defenses, and the potential claimant may not have sufficient information to allege and prove an FCA violation.

Recent Decision

A recent federal court decision indicates that there may be other causes of action available against a competitor whose business practices violate the FAS or Stark Law. In *Millenium Labs, Inc. v. Universal Oral Fluid Labs, LLC*, two Millenium Laboratories filed a lawsuit against a competitor, Universal Oral Fluid Laboratories (UOFL) seeking monetary damages and injunctive relief from UOFL's agreements with physicians that allegedly violated the FAS and Stark Law. The legal claims were not made under those statutes, however. Millenium relied on a variety of state and federal prohibitions, including laws related to deceptive and unfair trade practices.

Each party sought a pre-trial summary judgment in its own favor and contested the other party's summary judgment motion. UOFL did not assert that its arrangements complied with the FAS and Stark Law. It argued, instead, that it could not be sued under the laws relied on by Millenium because the claims were based on FAS and Stark Law violations. The United States District Court disagreed, stating that “conduct violating the Anti-kickback Statute and the Stark Law may provide the basis for liability under recognized common law causes of action and other state statutory laws provided all the elements of the causes of action are met.” The court determined that UOFL had violated the FAS and Stark Law and that it had engaged in illegal, unfair or deceptive conduct that could potentially result in liability on the legal grounds that had been alleged.

However, the court did not grant summary judgment to Millenium because it was not clear whether or not Millenium had been injured or damaged as a result of UOFL's legal violations. According to the court, while Millenium presented evidence that UOFL provided payments to certain Millenium clients, who began using UOFL's lab testing services, the only evidence presented that indicated that Millenium's clients ceased using Millenium because of UOFL's unlawful payments was inadmissible hearsay.

Ober|Kaler's Comments

The court's decision indicates that a health care provider that has been damaged by a competitor's violation of the FAS or Stark Law may have a valid cause of action against the competitor under other federal or state laws. However, it will be required to prove that the competitor's violations resulted in monetary damages. This may be no easy task, particularly because referral sources may be reluctant to acknowledge that they made referrals to the competitor based on financial considerations.

1 *U.S. ex rel. Villafane v. Solinger*, 543 F. Supp. 2d, 678, 682–83 (W.D. Ky. 2008).

2 *Millenium Labs, Inc. v. Universal Oral Fluid Labs, LLC*, No. 8:11-cv-1757-T35 TBM (M.D. Fl. Aug. 16, 2013).