PUBLICATION

Laboratory Discount Arrangements Survive Antikickback Statute Scrutiny [Ober|Kaler]

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There has been question for some time whether in evaluating certain discount arrangements involving clinical laboratory tests under the federal antikickback statute (FAS), discount charges should be measured against the service's fair market value (FMV) or the cost of providing the service; and, to the extent that cost is relevant, how it should be determined. A recent federal court decision related to pricing arrangements between a mobile x-ray supplier and skilled nursing facilities (SNFs) indicates that a laboratory may not violate the FAS by discounting charges below the "fully loaded cost" of the tests. United States ex. rel. McDonough v. Symphony Diagnostic Servs, Inc., No. 2:08-cv-00114 (S.D. Ohio Aug. 12, 2014).

In this case, a *qui tam* relator (Relator) alleged that a supplier of mobile x-rays violated the False Claims Act (FCA) by billing for services referred by SNFs to which it had provided discounts. The Relator alleged that the discounts provided to the SNF on x-ray services that were covered under Medicare Part A were intended to induce the SNF to refer x-ray services to the x-ray supplier for Medicare Part B patients, for which the supplier could bill Medicare directly. The Relator asserted that the arrangement violated the FAS because the discounted charges were below fully loaded costs, reflecting all fixed and variable expenses, including allocated administrative costs. According to the Relator, the x-ray supplier had included direct costs and some indirect costs in determining cost of testing, but did not include overhead costs. In response, the supplier asserted that the rates for Part A services were fair market value (FMV) and had been negotiated in a competitive market place.

The court stated that "even accepting that FMV is not the proper test for remuneration" as the Relator asserted, there would be no violation of the FAS if the court either rejected the Relator's reliance on fully loaded costs or found that it was not the only permissible method of determining costs under the FAS. The court disregarded OIG advisory opinions that provided for comparison of discounted charges with fully loaded costs, stating that such opinions did not establish binding rules and did not receive deference. Additionally, the OIG had indicated only that discounted charges that were below fully loaded costs were suspect, requiring further investigation. The court determined that *fully loaded costs* was not the only appropriate measure of costs under the FAS, and awarded summary judgment to the x-ray supplier.

Ober|Kaler Comments

Although the possibility remains that a court would require discounted charges to cover fully loaded costs – particularly if a lab otherwise computed costs on that basis – this decision adds to existing case law indicating that discounted charges may not need to cover all of the tests' direct and indirect costs to comply with the FAS. Of course, any discount that is tied to referrals of services for which a laboratory can bill a federal health care program directly can result in violation of the FAS.