

Physician Ownership of Hospitals Significantly Impacted by Health Care Reform Legislation

By Craig A. Conway, J.D., LL.M. (Health Law)
caconway@central.uh.edu

The Physician Hospitals of America, the American Medical Association, and other advocacy groups warned Congress that a provision in the then-pending health care reform bills would result in significant nationwide job loss and put a stop to nearly 60 hospitals under construction.¹ However, the provision remained in the legislation and, as a result, the Patient Protection and Affordable Care Act,² prohibits future physician investment in hospitals and caps existing physician investment in hospitals as of March 23, 2010.³ In effect, the provision significantly restricts an exception to the Stark Law prohibiting physician ownership interests in the “whole hospital” – known as the Whole Hospital Exception.⁴ Although the provision received little media attention, opponents of the inclusion state that it immediately places 25,000 jobs in jeopardy, halts nearly \$5 billion in ongoing hospital construction projects, and creates confusion and uncertainty.

The Stark Law

The Stark Law generally prohibits a physician (or a physician with an immediate family member) who has a financial relationship with an entity from referring a patient to that entity for designated health services payable, in whole or in part, by the Medicare program.⁵ Designated health care services include, among others: clinical laboratory services; physical therapy services; occupational therapy services; radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services; radiation therapy services and supplies; durable medical equipment and supplies, etc. Relationships subject to the law include direct and indirect physician (or family member) ownership and investment interests as well as compensation arrangements.⁶ Violations of the Stark law can be harsh – from monetary fines ranging

¹ See Physician Hosp. of America, Press Release, *Health Care Reform Bill Puts Physician-Owned Hospitals in Peril*, Mar. 25, 2010, <http://www.physicianhospitals.org/documents/032410Healthcarereformbillputsphysicainownedhospitalsinperil.pdf>; Physician Hosp. of America, Press Release, *Physician Owned Hospitals React to the Passage of Healthcare Reform*, Mar. 24, 2010, <http://www.physicianhospitals.org/documents/032410Physicianownedhospitalsreacttothepassageofhealthcarereform.pdf>; Am. Med. Ass'n, *Frequently Asked Questions About Health System Reform Legislation (H.R. 3590)*, Mar. 19, 2010, <http://www.ama-assn.org/ama1/pub/upload/mm/399/hsr-3590-faq.pdf>; Robert Lowes, *AMA Supports Latest Healthcare Reform Legislation With Reservations*, MEDSCAPE MED. NEWS, Mar. 19, 2010, <http://www.medscape.com/viewarticle/718909>.

² Patient Protection and Affordable Care Act, H.R. 3590, Pub. L. No. 111-148, 111th Cong. (2010).

³ *Id.* at § 6001 *et seq.* Waller Landsen Dortch & Davis, LLP, *Healthcare Reform Bill Prevents New Physician Ownership in Hospitals*, Mar. 25, 2010, <http://www.wallerlaw.com/articles/2010/03/25/healthcare-reform-bill-prevents-new-physician-ownership-in-hospitals.116887>.

⁴ *Id.*

⁵ 42 U.S.C. § 1395nn(a)(1)(A) (2009). See also Stacey A. Tovino, *Structuring Physician Recruitment Arrangements in Accordance with the Stark II/Phase II Interim Final Rule*, June 25, 2004, <http://www.law.uh.edu/healthlaw/perspectives/MedicalProfessionals/062504PhysicianRecruitment.pdf>.

⁶ 42 U.S.C. § 1395nn(a)(2) (2009).

from \$15,000 to \$100,000 for each violation to exclusion from participation in the Medicare program.

The theory behind the Stark Law is that if physicians were allowed to make self-referrals they would refer more than is actually medically necessary, resulting in over-utilization and compromising the physician's ethical standards.⁷ However, over the years, exceptions have been made in the regulations. One of these exceptions, or "safe harbors," is known as the "whole hospital" exception.

New Healthcare Reform Bill Affects The Whole Hospital Exception

The Stark Law currently allows physicians to hold investment ownership interests in hospitals under the "whole hospital" exception. This safe harbor requires that the referring physician owner (1) have a financial interest in the whole hospital, and not just a specific part; (2) be authorized to perform services at the hospital; and (3) be expected to actually perform the services.⁸

Effective immediately, section 6001 of the Patient Protection and Affordable Care Act prohibits future physician investment and caps existing physician investment in hospitals. The provision prohibits hospitals from increasing the total percentage of the total value of the ownership interests held in a hospital by physicians.⁹ In an effort to increase transparency, the provision also expands requirements to ensure that physicians who are investors in a hospital are *bona fide* owners. Further, the reform legislation excludes from the whole hospital exception hospitals converted from ambulatory surgery centers on or after the law's passage. Hospitals not meeting all requirements by September 23, 2011, will be subject to liability under the Stark Law.

Existing physician-owned hospitals that have a Medicare provider agreement in place as of December 31, 2010, will be grandfathered in. In other words, agreements and construction that are completed by that date will be eligible for the Stark Law exception. After that date, new physician ownership in a hospital will not be allowed. However, there are likely very few hospitals structured with physician investment or ownership currently under construction that will be able to meet that December 31st deadline. Regardless, the cap on physician investment became the law of the land at the time President Obama signed the legislation on March 23, 2010.

⁷ See Cherilyn G. Murer, *Stark Reality: Physician-Owned Specialty Hospitals May Not Be "Whole" For Long*, <http://www.murer.com/files/uploads/docs/starkreality.pdf> (last accessed Apr. 8, 2010).

⁸ 42 C.F.R. § 411.356(c) (2008). See also Am. Health Lawyers Ass'n, Balch & Bingham, LLP, *Digging Through the Rubble: What Opportunities for Physician-Hospital Joint Ventures Remain Standing?*, http://www.healthlawyers.org/Events/Programs/Materials/Documents/IHC09/legalresources/balch_resource.pdf (last accessed Apr. 5, 2010).

⁹ H.R. 3590, § 6001, Pub. L. No. 111-148, 111th Cong. (2010).

New Self-Referral Disclosures

In a related provision, section 6409 of the Patient Protection and Affordable Care Act allows health care providers to self-disclose violations of the Stark Law – something that has previously not been allowed.

In years past, the Office of Inspector General (OIG) for the Department of Health and Human Services accepted disclosures for self-reported violations of the Stark Law. However, in 2009 that changed when a letter¹⁰ sent by the OIG informed providers that Stark violations had to be disclosed along with other violations – which the OIG would not settle for less than \$50,000. Under the health care reform bill, the Secretary of Health and Human Services (HHS) must create a protocol that will allow health care providers to self-disclose an actual or potential violation of the Stark Law.

Interestingly, the HHS Secretary has been granted the authority to weigh certain factors when determining what fine or penalties will be assessed for self-disclosed Stark Law violations, including the nature and extent of the violation, the timeliness of the self-disclosure and the cooperation shown by the individual or entity making the disclosure. This is a significant development because prior to the passage of the Act, the Centers for Medicare and Medicaid Services (CMS) did not believe that it had the authority to compromise penalties for Stark Law violations.¹¹

Opposition to Physician Owned Hospitals

Congressional efforts to prevent physician ownership in hospitals are not a new phenomenon. In 2003, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act (MMA),¹² which amended the Stark Law's whole hospital exception to include an 18-month moratorium on physician ownership in specialty hospitals from December 3, 2003 through June 7, 2005.¹³ As part of the MMA, Congress directed the Medicare Payment Advisory Commission (MedPac) to analyze the effects of the moratorium. MedPac reported that physician ownership of specialty hospitals did not have any quality, abuse or other issues, and that the most common reason for physicians to establish hospitals was governance.¹⁴ In 2005, Senators Charles Grassley (R-Iowa) and Max Baucus (D-Mon.) introduced legislation that would have extended the moratorium indefinitely. However, the bill died in committee. Additionally, in June

¹⁰ See Dep't of Health & Human Servs., David R. Levinson, Inspector General, *An Open Letter to Health Care Providers*, (Mar. 24, 2009), available at <http://oig.hhs.gov/fraud/docs/openletters/OpenLetter3-24-09.pdf>.

¹¹ See Ice Miller, *Evolution of the Stark Law Continues With the Patient Protection and Affordable Healthcare Act*, http://www.icemiller.com/enewsletter/Bulletins/Stark_Law_Patient_Protection_and_Affordable_Healthcare_Act.htm (last accessed Apr. 7, 2010).

¹² Pub. L. No. 108-173 108th Cong. (2003), available at <http://www.ustreas.gov/offices/public-affairs/hsa/pdf/pl108-173.pdf>.

¹³ *Id.* Michael W. Paddock and Matthew T. Fornataro, *Health Reform Legislation Promises Significant Limitations On New and Continued Physician Ownership and Investment in Specialty and Other Hospitals*, ABA HEALTH ESOURCE, (Jan. 2010), <http://www.abanet.org/health/esource/Volume6/05/Paddock.html>.

¹⁴ Victor Moldovan, *Will Healthcare Reform Kill Surgeon Ownership?*, ORTHOPRENEUR (Mar./Apr. 2010), https://www.orthoworld.com/site/docs/op/online/2010/marapr/editorial_moldovan.pdf.

2005, the CMS instructed all State Survey Agency Directors “not to process any new Medicare provider enrollment applications (CMS-855A forms) for specialty hospitals.”¹⁵ In effect, CMS had ordered a moratorium on the Medicare enrollment of new specialty hospitals, whether physician-owned or not. Through the Deficit Reduction Act of 2005, Congress required CMS to continue the enrollment moratorium until the agency delivered to lawmakers a final report detailing physician ownership in specialty hospitals.¹⁶ CMS delivered that report to Congress on August 8, 2006, at which time the suspension was lifted.

Conclusion

Victor Moldovan, a healthcare attorney in Atlanta, Georgia, wrote an interesting article on the then-pending healthcare reform legislation as it pertains to the whole hospital exception modifications.¹⁷ He wrote that the intent of the provision is to “maroon physician owned hospitals in a sort of regulatory purgatory until they eventually wither away entirely or they are purchased by non-physician owners.”¹⁸ The decision by a physician to stay in practice or be employed by a hospital, Moldovan wrote, is uniquely up to the physician, and there are a myriad of reasons why one type of practice is better for each physician.¹⁹ “The issue here is whether a physician who has an investment interest in a hospital has any more conflict than a physician who is employed by a hospital,” wrote Moldovan.²⁰

Health Law Perspectives (April 2010)

Health Law & Policy Institute

University of Houston Law Center

<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

The opinions, beliefs and viewpoints expressed by the various Health Law Perspectives authors on this web site do not necessarily reflect the opinions, beliefs, viewpoints, or official policies of the Health Law & Policy Institute and do not constitute legal advice. The Health Law & Policy Institute is part of the University of Houston Law Center. It is guided by an advisory board consisting of leading academicians, health law practitioners, representatives of area institutions, and public officials. A primary mission of the Institute is to provide policy analysis for members of the Texas Legislature and health and human service agencies in state government.

¹⁵ Michael W. Paddock and Matthew T. Fornataro, *supra* note 6 (citing CMS Letter, *Suspension of Processing New Provider Enrollment Applications (CMS-855A) for Specialty Hospitals*, (June 9, 2005), available at <http://www.cms.gov/SurveyCertificationGenInfo/downloads/SCLetter05-35.pdf>).

¹⁶ *Id.*

¹⁷ See Victor Moldovan, *supra* note 7.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*