A Texas Stark Law?

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Texas Senators Jane Nelson, Jon Lindsay, and Frank Madla, as well as Representatives Betty Brown and Senfronia Thompson, recently introduced bills that would regulate a physician’s ability to refer patients to an entity with which the physician has a financial relationship. If passed, the bills would contribute to the Texas government’s arsenal against health care fraud.

In 1987, Congress enacted the Anti-Kickback Statute, a criminal provision designed to prohibit the offering, paying, soliciting, or receiving of remuneration to induce an individual to refer patients to any facility, or to purchase, lease, or order any item or service, for which payment may be made by a federal health care program. In 1989, Congress enacted the Stark Law, a civil provision designed to prohibit the referral of Medicare patients to entities with which the referring physician (or an immediate family member of the physician) has a financial relationship for the furnishing of clinical laboratory services. In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993, which expanded the Stark Law prohibition to Medicaid patients and identified ten additional “designated health services.” The Anti-Kickback Statute and the Stark Law are two specific weapons in the federal government’s arsenal against health care fraud.

Following in Congress’ footsteps, many state legislatures passed analogous health care fraud provisions in the 1990s. For example, in 1992 the Florida Legislature passed its Patient Self-Referral Act, a civil provision that is roughly analogous to the federal
Stark Law. In 1999, the Texas Legislature passed its Solicitation of Patients Act, a criminal provision that is roughly analogous to the federal Anti-Kickback Statute. Unlike the Florida Legislature, the Texas Legislature has not yet enacted a civil provision like the Stark Law.

On March 11, 2005, however, Representative Thompson introduced House Bill 3281 (HB 3281), which would add a new Chapter 112 to the Texas Occupation Code and establish a Stark Law-like provision. Specifically, HB 3281 would prohibit: (1) a health care provider from referring a patient for the provision of designated health services or supplies to a person in which the health care provider is directly or indirectly an investor or has an investment interest; and (2) a health care provider or other person from presenting a claim for payment to any person or third party payor for a designated health service or supply furnished pursuant to a prohibited referral. Interestingly, HB 3281 includes a broader array of services and supplies in its definitions of ‘designated health services’ and ‘designated health supplies’ than the federal government includes in its definition of ‘designated health services.’ Exceptions to the general prohibitions would exist for certain arrangements involving academic medical centers, health maintenance organizations, and publicly held corporations. Penalties include, but are not limited to, civil penalties of not more than $15,000 per bill or claim.

In addition, on March 2, 2005, Senator Nelson introduced Senate Bill 872, which would amend the Texas Occupations Code to clarify that, with certain exceptions, a health care provider has engaged in “unprofessional conduct” if the provider “knowingly directs or requires a patient to obtain health care goods or services from a niche hospital” in which the health care provider or an immediate family member of the
provider has a financial interest.” An exception exists for situations in which the provider both: (1) discloses to the patient, in writing, that the provider or the provider’s family member has a financial interest in the niche hospital; and (2) informs the patient that the patient has the option of using an alternative health care facility. A second exception exists for financial interests in publicly available shares of a registered investment company, such as a mutual fund, that owns publicly traded equity securities or debt obligations issued by a niche hospital or an entity that owns the niche hospital.

Finally, on March 11, 2005, Senator Lindsay introduced Senate Bill 1622 and Representative Brown introduced House Bill 3316, both of which would amend the Texas Health and Safety Code to require specialty hospitals, ambulatory surgery centers, and imaging centers to disclose to patients, the Texas State Board of Medical Examiners, and the Department of State Health Services the fact of physician ownership in the facility. Both bills also would amend the Texas Occupations Code to establish a two-year moratorium on physician referrals to such facilities.

Those who are interested in seeing the Texas Legislature pass a Stark-like law should follow these bills carefully.

4. The federal government has additional, general weapons against health care fraud including, but not limited to, the Civil False Claims Act and the Mail and Wire Fraud statute. 31 U.S.C. § 3729-33 (2000); 18 U.S.C. §§ 1341, 1343, 1346 (2000).
7. H.B. 3281, 79th Leg., R.S. (Tx. 2005), available at Http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SSESS=R&CHAMBER=H&BILLYTYPE=B&BILLSUFFIX=03281&VERSION=1&TYPE=B. On March 9 and March 11, 2005, Senator Madla and Representative Brown introduced companion bills that are similar to HB 3281, but that would prohibit physician referrals to entities located within a 30-mile radius of a critical access hospital, a sole community hospital, or a hospital...

8 Unlike the federal Stark law, which prohibits referrals to “entities” with which the physician (or an immediate family member of the physician) has a financial relationship, HB 3281 would prohibit referrals to “persons” in which there is an investment interest. The bill does not define the term “person” but presumably it would include organizations and other entities because of the difficulty of proving that one person has an investment interest in another person.

9 Id. § 1.
10 Id.
11 Id.
12 Id.
14 SB 872 defines a “niche hospital” as a hospital that: (A) classifies at least two-thirds of the hospital’s Medicare patients or, if data is available, all patients: (i) in not more than two major diagnosis-related groups; or (ii) in surgical diagnosis-related groups; (B) specializes in one or more of the following areas: (i) cardiac; (ii) orthopedics; (iii) surgery; or (iv) women’s health; and (C) is not: (i) a public hospital; (ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or (iii) a hospital with fewer than 10 claims per bed per year. Id.
15 Id. § 1.
16 Id.
17 Id.
20 Id. § 2.
21 Id. § 3.