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Competitor Blows the Whistle on Medical Group and Hospital

The United States Department of Justice (DOJ) has intervened in a whistleblower lawsuit alleging that a hospital paid illegal remuneration to a large cardiology group by providing the group with preferential scheduling in the hospital's cardiology department. The government's legal theories could call into question routine scheduling policies currently utilized by hospitals. While many questions remain unanswered, hospitals should carefully review scheduling policies and the manner in which they are implemented to ensure consistency with applicable law.

On April 1, 2008, the DOJ intervened in a federal whistleblower complaint filed in Cincinnati, Ohio, alleging that The Christ Hospital (Hospital), its former parent, and The Ohio Heart & Vascular Center (Ohio Heart) violated the Federal False Claims Act and the Federal Anti-kickback Statute through an arrangement whereby Ohio Heart leveraged the value of its referrals to the Hospital in exchange for preferential scheduling in the Hospital's Heart Station. The whistleblower in the case, Harry F. Fry, M.D., is a retired physician and a former competitor of Ohio Heart. The complaint alleges, among other things, that attending to patients at the Hospital's Heart Station provided lucrative spin-off cardiac surgeries and procedures to the benefit of Ohio Heart, that the Hospital and Ohio Heart both knew that these actions were illegal, and that attempts to remedy the situation were a sham.

The Hospital and Ohio Heart have vigorously denied any wrongdoing while asserting that there was no incorrect billing; no unnecessary tests were performed; and scheduling practices do not constitute remuneration. The Hospital and Ohio Heart point out that reimbursement for the cardiac readings performed at the Heart Station is minimal, and that providing care at the Heart Station did not result in a significant patient stream to Ohio Heart, since the cardiac readings were provided to the patient's primary care physician for follow-up and referral.

The value associated with assignment of time and scheduling of procedures in hospitals has been subject to policy debate for some time. Taken to its logical extreme, the legal theory behind the complaint calls into question many day-to-day scheduling activities at hospitals that until now have been considered routine. The case is particularly ironic since hospitals in many settings experience difficulty in scheduling sufficient physician coverage.

The Complaint

The third amended complaint was unsealed following the DOJ's decision to intervene. It is anticipated that the DOJ will file a further amended complaint. The defendants have been aware of the

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investigation and have been cooperating with the government since 2004. The following are some of the key allegations contained in the unsealed complaint.

In 1986, following the completion of his residency and fellowship in cardiology, Dr. Fry returned to his hometown of Cincinnati to practice medicine at the Hospital. The complaint alleges that by 1995, Ohio Heart was the dominant cardiology group in Cincinnati and through a series of medical group acquisitions and recruiting, had “monopolized cardiology” in Cincinnati. The complaint does not contain any allegations that antitrust laws were violated.

According to the complaint, the revenue stream associated with cardiac procedures gave Ohio Heart “inordinate leverage” that resulted in “favored treatment” by the Hospital. The complaint alleges that the Hospital and Ohio Heart colluded with one another to assign panel time at the Hospital's Heart Station based solely on the value and volume of referrals to the Hospital. While at the Heart Station, cardiologists could elect to read tests of their own patients or new patients. The complaint alleges that “a majority of the patients needing tests” did not have their own cardiologists. Thus, once assigned to the Heart Station, a cardiologist could bill for the cardiology read and have access to new patients who would be “a patient for his or her lifetime.”

The complaint further alleges that by 1999, the physicians who were not part of Ohio Heart were increasingly frustrated with the preferential treatment provided to Ohio Heart. The complaint further alleges, based on hearsay, that the Hospital's lawyers had informed Hospital administration that its scheduling method was illegal. Following discussions with the dissatisfied physicians, the Hospital issued a request for proposal relating to the allocation of time in the Heart Station and a new scheduling policy ultimately was adopted. Irrespective of the change in policy, the complaint concludes that Ohio Heart continued to control indirectly the time allocation at the Heart Station and “the lone criterion in determining panel time allocation” was referrals.

Issues Raised

At this point, the DOJ's decision to intervene in this dispute raises many more questions than it answers. A fundamental question is whether granting clinical privileges or providing scheduling preferences constitutes remuneration? And, if so, what is the fair market value of the remuneration? If scheduling does constitute remuneration, what standards may a hospital utilize in making scheduling determinations? A similar issue is whether a hospital must make its resources such as time, equipment, and staff, equally available to all the physicians on its medical staff?

Lessons Learned

While the impact of this case is not clear at the moment, there are several points worth noting. First, scheduling decisions at a hospital should not be made solely on the basis of the value or volume of referrals, either implicitly or explicitly. Second, hospitals should ensure that the policies and procedures they have in place are being applied appropriately. Third, hospitals should ensure that their compliance department, in cooperation with management and legal counsel, has the tools that it needs to deal with allegations of impropriety appropriately and promptly.