

MEDICARE COMPLIANCE

MD Wins Stark Part of False Claims Case Due to Consultation Role

A federal court on June 3 threw out Stark allegations against a Georgia radiation oncologist in a case revolving around intensity-modulated radiation therapy (IMRT). But the false claims lawsuit, which also alleges the physician was not actually providing IMRT and violated the anti-kickback law, may proceed, according to the ruling by Clay D. Land, chief judge of the U.S. District Court for the Middle District of Georgia.

The Stark liability was sidestepped because the radiation oncologist was deemed a consultant to other physicians who sent him patients, says Atlanta attorney Alan Rumph, with Baker Donelson. The Stark law has an exception for consultations, which gives radiologists, pathologists and radiation oncologists a pass because they're not considered a direct source of referrals, Rumph says.

According to the court ruling, radiation oncologist Thomas J. Tidwell owned Tidwell Cancer Treatment Center, a freestanding radiation oncology clinic in Columbus, Ga., which was managed by his wife, Eve Tidwell. The center bought a system known as DynART in 2002 from 3-D Line, which told the couple it performed IMRT and used treatment planning software. The Tidwells kept DynART current and billed Medicare and Medicaid for IMRT. No red flags were raised by external auditors in 2006, 2008 and 2011. "Evidence does exist, however, which, if believed, arguably contradicts the Tidwells' contention that they believed the DynART system performed IMRT," the judge said in ruling on the motion for summary judgment.

In 2010, Columbus Regional Healthcare System paid \$10.5 million for the Tidwell Cancer Treatment Center, where Tidwell continued to treat patients, and his wife kept working. According to the whistleblower who filed the false claims case against Tidwell, the hospital allegedly paid more than fair-market value for the treatment center to ensure its patient referrals. The court ruling said a valuation expert declared \$10 million the high end of fair-market value, but that Tidwell's accountant gave ranges of \$12 million to \$18 million.

The judge came down on Tidwell's side on Stark, but will let the whistleblower's case move forward on other grounds. It's up to a jury to decide whether Tidwell knew the DynART system failed to provide IMRT or

whether Tidwell satisfied Medicare and Medicaid IMRT billing requirements.

It's also a matter for the jury to determine whether the anti-kickback law was violated by Tidwell seeking money from the hospital in exchange for referrals. "Dr. Tidwell does not appear to dispute that a purpose of Columbus Regional's purchase of the Treatment Center was to ensure that Dr. Tidwell referred his patients to Columbus Regional," the ruling states. But the physician contends the hospital paid fair-market value.

The Stark claim is another matter, and the whistleblower lost this argument. Stark forbids Medicare payments to designated health services entities for services referred by physicians who have a financial relationship with the DHS entity, unless an exception applies. There's no referral under Stark, however, for "a request by a radiation oncologist for radiation therapy, if such services are furnished by (or under the supervision of) such pathologist, radiologist, or radiation oncologist pursuant to a consultation requested by another physician."

The judge said Tidwell produced evidence that after he sold his treatment center to the hospital, he saw patients "in consultation at the request of and referral from other physicians." Assuming the evidence holds up, "there would be no legal basis supporting a claim based on a violation of the Stark Law."

Rumph advises providers to keep in mind that the concept of consultation "can be a two-edged sword under the Stark law." While Tidwell avoided Stark liability in this context, that won't be the case for most other specialists. "Where the consulted physician isn't a radiologist, radiation oncologist or pathologist, then both the consulting physician and the consulted physician are deemed to refer the designated health services. For example, if a primary care physician sends a patient for a consultation with an orthopedist in a different practice and the orthopedist orders physical therapy performed in the practice, then the PCP is also deemed to refer the therapy," Rumph says. "And the in-office ancillary services exception protecting the orthopedist's referral won't protect the PCP's referral if there is a financial relationship between the parties."

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