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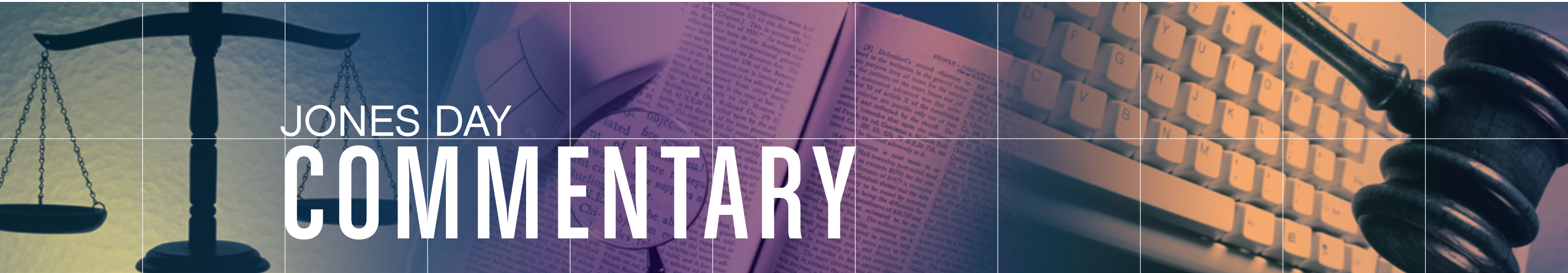

ILLINOIS ATTORNEY GENERAL REACHES SETTLEMENT WITH DIAGNOSTIC CENTERS IN CONNECTION WITH ALLEGED VIOLATIONS OF ILLINOIS ANTI-KICKBACK, FALSE CLAIMS, AND CONSUMER FRAUD LAWS

In a settlement reached in mid-January, MIDI, LLC and 14 Open Advanced MRI centers in Illinois have agreed to pay a total of $1.2 million and cease certain business arrangements with referring physicians in connection with alleged violations of Illinois anti-kickback, false claims, and consumer fraud laws.[1] The state will receive $840,000 of the settlement amount.[2] The settlement arises from a lawsuit filed against the diagnostic centers by a relator on February 7, 2006.[3] Illinois Attorney General Lisa Madigan subsequently filed a notice of intervention on behalf of the State of Illinois on April 27, 2007.[4] Five smaller radiology centers in Illinois have also settled similar lawsuits.

Diagnostic centers nationwide have come under the scrutiny of state and federal regulators for the very same types of business arrangements that were the subject of the Illinois lawsuit—*i.e.*, turnkey per-click services arrangements (sometimes styled as leases) in which the diagnostic center performs the technical

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1. The 14 MRI centers involved in this settlement are: Open Advanced MRI of Chicago, Open Advanced MRI of Tinley Park, Open Advanced MRI of Crystal Lake, Open Advanced MRI of Round Lake, Open Advanced MRI of Plainfield, Open Advanced MRI of Lincoln Park, Open Advanced MRI of Deer Park, Open Advanced MRI of Skokie, Gold Coast MRI at Washington Square, Open Advanced MRI of North Shore, Open Advanced MRI of Oak Brook, Open Advanced MRI of Schaumburg, Advanced Imaging of Deerfield, and Open Advanced MRI of Wheaton.
2. The relator (and his lawyers) will receive the remainder.
3. A similar lawsuit was filed on May 22, 2007, by relators Richard Vallandigham and Dana Vallandigham against 13 other diagnostic centers in Illinois.
4. People's First Amended Complaint, State ex. rel. *Donaldson v. MIDI LLC*, et al., No. 06 CH 02513 (Ill. Cir. Ct. Cook County filed April 27, 2007) ("Complaint").

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component of a diagnostic service and collects a flat fee from the referring physician/group who then bills insurers and/or patients for the service at a markup. The difference between the amount the physician pays the diagnostic center (*i.e.*, the per-click fee) and the amount the physician is paid by the payor may be considered to be remuneration implicating various state laws (as well as the federal Anti-Kickback Statute). As such, per-click lease arrangements of this type should be structured as joint ventures without physician markup (*i.e.*, the "leasing" physician should pay the diagnostic center, which the physicians would co-own, a fee equivalent to the amount the physician receives from payors for the service). Since many (if not most) states have statutes similar to those triggered under the Illinois settlement, it is likely that this signals a broader trend toward greater scrutiny of diagnostic center arrangements with physicians. Given the financial incentives to whistleblowers and the attention such arrangements are receiving from state attorneys general, diagnostic centers and physicians should consider and analyze potential risks arising under such arrangements.

THE ARRANGEMENTS IN QUESTION

Generally, the arrangements that were the subject of the Complaint provided for the physicians to lease or engage the diagnostic center for the provision of the technical component of diagnostic services for referred patients (*i.e.*, per-click) or, in a few instances, for an unspecified period of time (*i.e.*, per hour). Whether styled as a lease or services agreement, when the physician referred a patient under the arrangement, the diagnostic center allegedly would perform the imaging service (using the center's space, equipment, supplies, and employees), and the physician would pay the diagnostic center a flat fee. According to the Complaint, the physician would then bill and collect reimbursement for the diagnostic service, purportedly at a higher rate than the amount the physician paid the diagnostic center. The Illinois attorney general alleged that the difference between the amount the physician pays to the diagnostic center and the amount the physician is reimbursed by the patient's insurance is "an unlawful payment for a referral…" resulting in the submission of false and fraudulent claims.[5] The Complaint describes what it terms as a "scheme" for each of the defendant diagnostic centers and sums each up with an allegation that:

> [these] agreements with physicians, whether styled as leases or other types of Agreements, are a subterfuge designed to hide the kickbacks paid for referrals. The physicians who are parties to these Agreements do not participate in the imaging procedures, are not present at the imaging facility when their patients' procedures are performed, and have no direct personal involvement in their patients' diagnostic imaging procedures. The physicians purporting to lease the facility do not have the exclusive right to the facility for any specified period of time; instead they simply refer patients to the imaging facility, and the imaging facility exclusively controls the scheduling of patients.[6]

It is noteworthy that most of the agreements specifically excluded referrals of Medicare and Medicaid patients from the arrangement.

THE COMPLAINT

The Complaint contained four counts and was brought under the Illinois Insurance Claims Fraud Prevention Act (740 Ill. Comp. Stat. 92/1 *et seq.*), the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. 505/1 *et seq.*), and the Illinois Whistleblower Reward and Protection Act (740 Ill. Comp. Stat. 175/1 *et seq.*). As compared to the federal Stark and Anti-Kickback Statutes, these state laws have relatively few safe harbors and exceptions, and they cover more payors.

Illinois Insurance Claims Fraud Prevention Act. Under the Illinois Insurance Claims Fraud Prevention Act, it is unlawful to knowingly offer or pay any remuneration, directly or indirectly, in cash or in kind, to induce any person to procure clients or patients to obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured person or the person's insurer.[7] This is an "any payor" statute in that it is not limited to state health care program payors. Therefore, the exclusion of Medicare and Medicaid

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5. *Id*. ¶14.
6. *Id*. ¶51.
7. 740 Ill. Comp. Stat. 92/5a (2008).

patients from the arrangement did not take the operations of the diagnostic centers outside the scope of the statute. The Illinois attorney general alleged that defendants violated this statute by "repeatedly and knowingly offer[ing] or pa[ying] remuneration to physicians to induce those physicians to refer patients to obtain diagnostic imaging services that were to be the basis for a claim against insured persons or their insurers…." In the words of the Complaint, the centers "actively marketed and recruited physicians to enter into these Agreements enticing them to be a part of the scheme by offering them as a kickback for referrals a substantial portion of the fees charged for certain imaging procedures…"[8] The Illinois attorney general further alleged that the Illinois Insurance Fraud statute was also violated as a result of submitting claims that "falsely identified the referring physician as the person providing the diagnostic services, or falsely indicated the location where the services were performed, or falsely indicated that the referring physician was entitled to bill for those services."[9]

Illinois Consumer Fraud and Deceptive Business Practices Act. Under the Illinois Consumer Fraud and Deceptive Business Practices Act, "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact … in the conduct of any trade or commerce are unlawful whether any person has in fact been misled, deceived or damaged thereby."[10] The Illinois attorney general alleged that defendants' actions constituted unfair methods of competition and unfair and deceptive acts in violation of such law because:

- Defendants did not disclose to patients or insurers their financial relationships with referring physicians.
- The existence of the financial relationship is a material fact to patients and insurers and is the type of information that the patient or insurer would be expected to rely on in his/its decision-making.
- The undisclosed "kickbacks" are contrary to the public interest.

The Illinois attorney general also asserted that the undisclosed "kickbacks" are unethical and unscrupulous and have the potential to negatively affect patient care. Finally, the attorney general emphasized its view that the "kickbacks" give physicians an improper motive, cause patients and insurers to pay more for diagnostic services than those services cost the billing physician, and offend public policy.

Illinois Whistleblower Reward and Protection Act. The Illinois Whistleblower Reward and Protection Act provides, in pertinent part, for civil liability for "any person who knowingly presents, or causes to be presented to an officer or employee of the State … a false or fraudulent claim for payment or approval; or knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State, or conspires to defraud the State by getting a false or fraudulent claim allowed or paid…."[11] The Illinois attorney general alleged that certain of the defendants violated this law by virtue of false records or statements and false and fraudulent claims made by such defendants. Specifically, the Illinois attorney general alleged that defendants submitted claims that falsely represented that:

- The diagnostic imaging services were personally furnished by the referring physician or his/her employee under his/her personal direction.
- The imaging services were performed in the referring physician's own offices.
- The referring physician was entitled to bill globally for the diagnostic imaging services.
- The charges for services and other information was true and correct.
- The referring physician was entitled to payment for services actually performed by defendants.
- The submitting party and the services provided were in compliance with all laws.[12]

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8. Complaint ¶150.
9. *Id*. ¶171.
10. 815 Ill. Comp. Stat. 505/2 (2008).
11. 740 Ill. Comp. Stat. 175/3 (2008).
12. Complaint ¶191.

THE SETTLEMENT

As is typical in settlement agreements, the diagnostic centers did not acknowledge any wrongdoing in their actions or business arrangements with physicians. In addition to the $1.2 million payment, however, the diagnostic centers agreed not to knowingly pay or offer to pay any remuneration directly or indirectly, in cash or in kind, to induce any person to procure or refer clients or patients to obtain services or benefits under a contract of insurance or that may be the basis for a claim against an insured person or the person's insurer. That is to say, the diagnostic centers generally agreed not to violate the Illinois state anti-kickback laws. More importantly, they further agreed not to use any device or scheme to pay or offer to pay remuneration directly or indirectly, in cash or in kind, to induce a referral of patients to MIDI, including but not limited to:

- entering into or operating under a lease agreement, technical services agreement, MRI services agreement, or any other agreement, written or unwritten, whereby a referring doctor leases MIDI's space, equipment, and personnel, or purchases imaging services, for a fee that is less than the amount the physician or MIDI bills the patient or the patient's insurer for those services (*i.e.*, eliminating the mark-up potential);
- offering a paid medical directorship to a doctor in a position to refer patients to MIDI; or
- entering into any other type of arrangement, written or unwritten, whereby a referring doctor receives any type of remuneration or consideration, directly or indirectly, as a result of referring patients to MIDI or any entity affiliated with MIDI.

These settlement terms essentially have the effect of prohibiting the per-click lease arrangements that formed the basis of the allegations.

CONCLUSION

While it is unknown how the allegations under the lawsuit would have been decided had the case gone to trial, there is the potential that this settlement may embolden whistleblowers and signal a trend in actions of this nature being brought by whistleblowers and regulators against diagnostic centers that enter into such lease arrangements with referring physicians. The allegations and legal theories put forth in the Illinois case were fairly broad and could be similarly styled under the anti-kickback and false claims laws of other states. Viewing it from a broader perspective, this case may also signal a trend of more active enforcement of state anti-kickback and false claims laws with respect to health care business deals in general, particularly in situations where referring physicians have the opportunity to benefit from a markup of fees. Per-click lease arrangements of this type should be structured as joint ventures without physician markup (*i.e.*, the leasing physicians should pay the diagnostic center, which the physicians would co-own, a fee equivalent to the amount the physicians are receiving from payors for the service).

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