

Problematic Physician Relationships: Stark Traps for the Unwary

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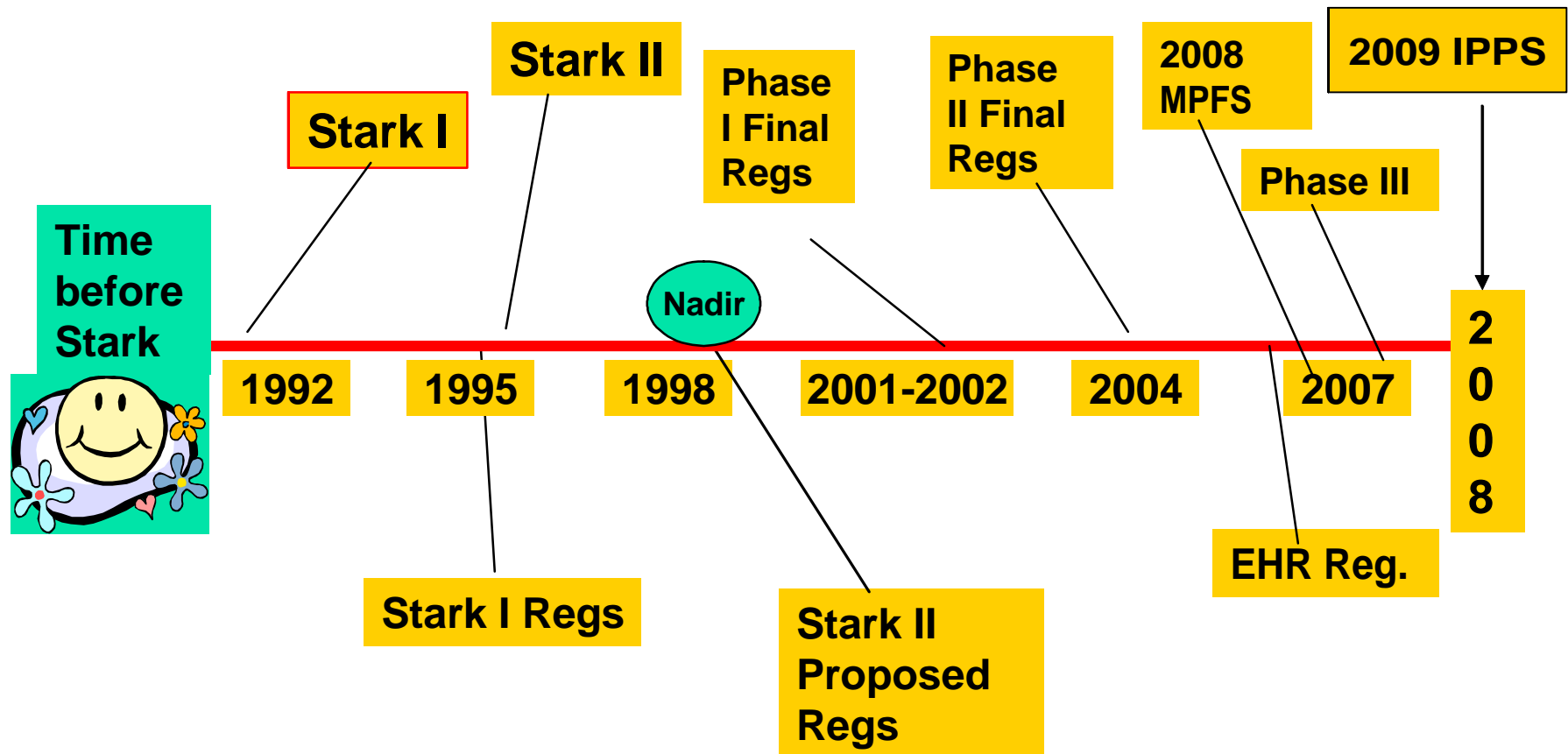
Stark Gone Wild

- In fall of 2007 CMS released the Phase III Final Stark Regulations
- Since then CMS has produced nothing short of a flurry of Stark proposals and amendments
- Reaction:
 - 4 stages of grief?
 - Surrender

Stark Gone Wild

- Why the flurry of activity?
 - New personnel at CMS
 - Agency use of Fee Schedule Rules to amend the Stark regs
 - Perception that “abusive” practices are on the rise
 - i.e. under arrangements
 - Dumb public comments lead to similar proposals
 - i.e. Stand in the Shoes

Stark Timeline



October 1, 2009 Deadline

- **Services Provided “Under Arrangements”**
- **Unit of Service (Per-Click) Payments in Lease Arrangements**
- **Percentage-Based Compensation Formulae in Lease Arrangements**

Under Arrangements: Entity

- In Phase I of the Stark II Final Regulations CMS adopted a fairly bright line rule: the person who bills the Medicare Program for a DHS is the “entity furnishing” the DHS
- Agency specifically considered under arrangements service agreements between physicians and hospitals and directed that they be analyzed as indirect compensation arrangements

Entity: New Definition

- In the 2009 IPPS Final Rule CMS amends the definition of “Entity” to include:
 - The person who performs a service billed as a DHS
 - The person who bills Medicare for a DHS
- This means that the physician’s financial relationship with the entity performing the under arrangements services must fit within a Stark exception

Meaning of “Perform”

- An entity includes the person who performs the service billed as a DHS
- CMS, however, refused to define what it means to *perform* a service
- If a medical group does everything except bill for a service it has likely performed the service
- CMS states, however, that providing space, equipment, personnel, management or other discrete services does not constitute “performing the service”

When does One “Perform” a Service?

- New exercise in line drawing?
- How many of the components of a service may be provided by a management company before it is deemed to be performing the service?
- Is this the next area where CMS will change its position after the industry has structured arrangements relying on it?

Under Arrangements

- Under the new definition of entity a physician's financial relationship with the service performer (as well as the hospital billing for service) must meet an exception
- If a physician has an ownership interest in the organization performing the service the available exceptions are limited
 - In Office Ancillary Services Exception generally not available because group does not bill for service

When Non-DHS become DHS

- Under the new definition services that would not be DHS if billed by the person performing the service will be considered DHS if the service is billed as a DHS
- For example, when a physician group performs and bills for cardiac cath it is not a DHS, but if the group performs the cardiac cath under arrangements and the hospital bills for the service it is a DHS-an outpatient hospital service
 - The cardiac cath is, therefore, a DHS even for purposes of analyzing the physician's referral to the group

Future of Under Arrangements with Physician Entities

- Physician Under Arrangements -- Options limited:
 - Rural Provider exception
 - Non owner physicians may refer to an under arrangements service provider
 - Indirect compensation analysis
 - Physicians who don't refer: Radiologists, radiation oncologists and pathologists
 - Lithotripsy: Not a DHS even when billed by a hospital

Medicare

Under
Arrangements

Hospital

Joint Venture
Cancer Center

P

P

- Are the Physicians owners?
- Rural Provider Exception?
- Are the Physicians Rad Oncs?

Percentage Compensation



- The Agency's position on percentage compensation formulae has fluctuated over time
- Ongoing controversy over whether a percentage of charges, collections or expenses met the "set in advance" requirement
- In 2009 IPPS Final Rule CMS takes a different tack
 - Amends the office and equipment lease, FMV and indirect compensation exceptions
 - Prohibits the use of compensation formulae based on percentage of revenues attributable to services performed or business generated in the leased space or generated through the use of leased equipment

Per Click Compensation



- Per click, per service or per procedure compensation has also had a checkered history under the Stark Law
- Legislative history strongly supports the permissibility of per click compensation
- Agency has reluctantly permitted it
- 2009 IPPS Final Rule
 - Amends the office and equipment lease, FMV and indirect compensation exceptions
 - Prohibits per unit-of-service rental charges to the extent that they reflect services provided to patients referred between the parties

Percentage/Per Click Leases

- Must be terminated or amended by October 1, 2009
- Many Lithotripter leases are per use
 - Lithotripsy not DHS but per click lease of lithotripter still not permissible

Problems Problems Problems

Expired Contracts:

- Hospital discovers that a physician contract expired 4 months ago and was not renewed, extended or replaced by a new contract
 - Parties have performed per the contract
- Same facts but 8 months has elapsed

Problems Problems Problems

No written contract???

- What constitutes a written agreement?
- When do all the elements of the agreement need to be in place to avoid triggering the referral prohibition?
- Can agreements be signed and made effective as of a past date?
- What is the effect of state law?
 - If a contract enforceable under state law will it be deemed a “written contract” for purposes of Stark?

Problems Problems Problems

Amendments –

- Six months into a physician agreement
 - Volume of services is materially lower or higher than expected and one party believes the compensation is too high or too low
 - The parties want to expand the scope of services or the number of hours for medical direction

Problems Problems Problems

Recruitment Agreement – Relocation:

- Physician practices more than 25 miles from hospital, but has consulting privileges on the medical staff
 - Physician offers to resign staff privileges
- Physician has provided services in the hospital as a *locum tenens*
- Physician lives in the service area, but maintains primary practice more than 25 miles away
- Medical group requests assistance for physician who has already agreed to relocate

Problems Problems Problems

Recruitment Agt – Income Guarantee (1 yr)

- Lack of effort to credential
- Lack of effort to bill
- Windfall collections due in the 13th month
- Physician wants early termination of the guarantee
- Despite good faith, cannot build a viable practice – need more time
- Physician quits medical group and wants own practice or join a new group

Problems Problems Problems

Recruitment Agt. – Guarantee
Enforcement

- Failure to submit financial statements
- Medical group improperly allocates expenses
- Recruit quits and leaves the area – pursue collection?

Problems Problems Problems

Recruitment Agm – Housing

- Recruit cannot obtain a housing loan which is 75% of the recruitment assistance

Problems Problems Problems

Recruitment – Other Issues

- Recruit refuses or fails to accept call obligations
- Recruit refuses to serve Medi-Cal patients
- Medical group requests help to recruit a mid-level practitioner for its practice
- Physician claims that he/she did not understand the contract

Problems Problems Problems

Take-Aways –

- Anticipate problems
- Leave some flexibility for anticipated changes
 - Change of employment status
 - Extension of assistance
 - Inability to obtain housing

Problems Problems Problems

Take-Aways –

- Represent that the hospital does not guarantee need or practice viability
- Stay in touch with physician-recruits
 - Read the financial reports
 - Communicate periodically
- Use the right of inspection and audit
- Enforce the agreement

Settlement of a Dispute

- Hospitals should be able to settle disputed claims involving physicians but . . .
 - What if lease dispute settled by termination of the lease but past due rent not repaid?
 - Can hospital loan a physician the funds to repay the hospital for excess compensation the physician received?
 - Settlements –When the parties negotiate a settlement will CMS accept the settlement payments as the return of “all” excess compensation?

What do I do when . . .

- Discovery of Stark violation
- Stop
 - Confirm the facts
 - Revisit legal analysis
 - Is there a reasonable basis for arguing that no violation occurred?

Stark Violation

- If there is a Stark violation what should you do?
 - No clear answer
 - No established mechanism for reporting and resolving Stark violations
 - CMS takes the position it does not have the authority to compromise Stark violations

Stark Violation

- Options:
 - Do nothing
 - Fix problem and move on
 - Fix problem, disclose and repay
 - Fix problem, disclose and attempt to compromise

Stark Violation

- Ignoring the violation is risky
- Fixing problem once discovered should limit False Claims Act exposure
- FCA Amendments?
- Disclosure
 - Legal obligation?
 - Right thing to do?

Stark Violation

- Where to disclose?
 - Carrier
 - CMS
 - OIG
 - US Attorney
- Who can compromise amount of repayment?
 - CMS (says no)
 - OIG (not willing)
 - US Attorney (yes, but risky)

The End of the Road



Questions and Answers

