

BB REVIEW

What's Inside . . .

I STARK

- *IPPS FY 2009 Stark Proposed Changes*

II FRAUD & ABUSE

- *Memorial Case in GA*
- *Evaluation of Merits Before Stay of Doctor's License Revocation Upheld by Alabama Court*
- *Clinical Lab Raises Kickback Risks*

III TAX

- *New Guidance Form 990*

IV CREDENTIALING

- *LA Hospital Had No Duty to Disclose Physician's Drug Problem*

V TORT REFORM

- *Superior Court Judge Strikes Cap on Non-Economic Damages*

VI COMMENTARY

- *Recent High Courts' Decisions Provide Cautionary Tales*

Healthcare News

May/June 2008

STARK

IPPS FY 2009 Stark Proposed Changes

On April 14, 2008, the Centers for Medicare and Medicaid Services ("CMS") issued the Proposed Fiscal Year 2009 Hospital Inpatient Prospective Payment rule (the "Proposed Rule"). Comments on the Proposed Rule are due June 13, 2008, with a final rule expected before August 1, 2008. Buried within the Proposed Rule are a number of provisions that propose changes to the Stark Self-Referral Law. The following are some of the more significant issues addressed in the Proposed Rule:

- *"Stand in the Shoes."* CMS is proposing two (2) alternative ways to address industry concerns regarding the applicability of the physician "stand in the shoes" provisions to academic medical centers ("AMC") and integrated health systems ("IHS"). Under the first approach, CMS would not require physicians to "stand in the shoes" of their physician organizations if the compensation arrangement between the physician and the physician organization satisfies the Stark Law exception for: (i) bona fide employment relationships; (ii) personal services arrangements; or (iii) the exception for fair market value compensation.

CMS has additionally proposed, with respect to AMCs, that the "stand in the shoes" provisions would not apply to arrangements that: (i) meet all requirements of the AMC exception to the Stark Law; or (ii) are in writing and provide for compensation by an AMC component to an affiliated physician organization for services that are necessary to fulfill the AMC's graduate medical education obligations. Under the second approach, CMS would develop a new exception to the Stark Law to protect certain non-abusive arrangements, including, for example, mission support payments.

- *Proposed DHS Entity "Stand in the Shoes" Rule.* CMS is also proposing that an entity that furnishes designated health services

(the "DHS Entity") would be deemed to stand in the shoes of an organization in which it has a one hundred percent (100%) ownership interest. Thus, the DHS Entity would be deemed to have the same compensation arrangements with the same parties and on the same terms as does the organization that it wholly owns. CMS is additionally seeking comments on whether an entity should "stand in the shoes" of an organization if it owns less than one hundred percent (100%) of the organization.

- *Revised Definitions of "Physician" and "Physician Organization."* CMS is proposing to revise the definitions for "physician" and "physician organization" to clarify that: (1) a physician and the professional corporation ("PC") of which he or she is the sole owner are always treated the same for purposes of applying the Stark Law; and (2) a physician who stands in the shoes of his or her wholly-owned PC also stands in the shoes of his or her physician organization.

- *Period of Disallowance.* CMS is proposing to clarify the period of disallowance, which is the CMS imposed sanction for Stark Law violations during which a physician cannot make designated health referrals to an entity and the entity could not bill for services pursuant to such referrals. For non-financial Stark Law violations, such as a missing signature or oral agreements where written, signed agreements are required, the period of disallowance will end when the violation is corrected. For financial violations, such as excess compensation or insufficient compensation, the period of disallowance would end when the arrangement is brought into compliance and excess compensation is returned or additional required compensation is paid, as applicable.

Corrections of Stark Law violations will not, however, convert prohibited referrals made during the period of disallowance into permissible referrals. CMS has declined to address how long the period of disallowance would last if a non-compliant arrangement simply terminates, but is not brought into compliance.

**BALCH & BINGHAM LLP
HEALTHCARE CONTACT
IN ATLANTA**

Richard D. Sanders

(404) 962-3578

rsanders@balch.com

30 Ivan Allen, Jr. Blvd., NW
Suite 700
Atlanta, GA 30308

Philip M. Sprinkle II

(404) 962-3573

psprinkle@balch.com

30 Ivan Allen, Jr. Blvd., NW
Suite 700
Atlanta, GA 30308
(Licensed in Virginia and
Florida; Georgia license is
pending)

**HEALTH LAW PRACTICE
GROUP MEMBERS
IN ATLANTA**

Chris Anulewicz

Mike Bowers

Natalie Christensen

Joe Mandarino

Dart Meadows

Jennifer Richter

Michelle Rothenberg-

Williams

Rich Sanders

Philip Sprinkle

Address Change . . .

If you no longer wish to receive this update or have an address change, please contact:

Nora Yardley

205-226-3476

nyardley@balch.com

- *Gainsharing Arrangements.* CMS is soliciting comments on whether a separate gainsharing arrangement exception to the Stark Law is necessary, and, if so, what safeguards should be included in the exception.

- *Physician-Owned Implant and Medical Device Companies.* Although the Proposed Rule does not specify any changes to the Stark Law, CMS is soliciting comments on whether the statute should be expanded to specifically address physician-owned implant and medical device companies and similar physician-owned companies, or whether such arrangements should continue to be addressed through enforcement of the False Claims Act, Anti-Kickback Statute, and other fraud and abuse laws.

- *Financial Relationships between Hospitals and Physicians.* CMS previously undertook an informal initiative to collect information on financial relationships between Medicare-participating hospitals and their physicians using Disclosure of Financial Relationships Reports ("DFRR"). CMS initially requested five hundred (500) hospitals complete the survey, and eventually intended to require that all hospitals provide information on their financial relationships with their physicians on a periodic basis. Before the effort could be fully implemented, CMS withdrew its efforts to collect the information.

CMS is now undertaking a somewhat more formal effort and seeking public comments on its initiative. Specifically, CMS is seeking comments regarding:

- (1) Whether the collection effort should be recurring, and if so, whether it should be collected on an annual or other periodic basis;
- (2) Whether the amount and type of information being collected in the DFRR is appropriate;
- (3) The amount of time it will take for hospitals to complete and return the DFRR and the costs associated with the completion of the report;
- (4) Whether CMS should collect information from all hospitals, and if so, whether collection should be staggered so that only a certain number of hospitals must submit a DFRR per year; and
- (5) Whether hospitals that have submitted a report should be required to submit annual updates, reporting only information that has changed within that year.

FRAUD & ABUSE

Savannah Hospital Ordered to Pay Millions to Resolve Fraud Allegations

Memorial Health, Inc., a parent company for Memorial Health University Medical Center, in Savannah, Georgia ("Memorial") has agreed to pay the United States \$5.08 million to settle fraud allegations for improper payments to physicians. The suit was filed in July, 2006 by Dr. Ryan R. Boland, accusing the hospital and other defendants of violating the Federal False Claims Act.

The federal government joined Dr. Boland's complaint, and together based on its own investigation, contended that between January 2003 and December 2006, Memorial compensated employee ophthalmologists at levels that were not commercially reasonable and that exceeded fair market value. The complaint alleged this compensation included salaries, bonuses, teaching stipends and indigent care payment bonuses. Dr. Boland also contended that Memorial was influencing patient referrals through these excessive payments to particular physicians and medical groups violating the Stark self-referral laws.

Under the terms of the settlement, Memorial has entered into a Certification of Compliance Agreement with the U.S. Department of Health and Human Services, Office of Inspector General, ensuring future compliance with Medicare regulations. The whistleblower, Dr. Boland, will share in the government's settlement recovery and will receive \$889,000.

To read more about Memorial, go to http://www.balch.com/files/upload/45_08MemorialHealthUniv.pdf.

Evaluation of Merits Before Stay of Doctor's License Revocation Upheld by Alabama Courts

On May 9, 2008, the Alabama Court of Civil Appeals ruled that an Alabama statute, which requires a physician seeking to stay the revocation of his license to prove that he will succeed on the merits of his claim that the decision was wrong, is constitutional even where the transcript of the commission's hearing was unavailable. *Medical Licensure Commission of Alabama*, No. 2070245, 2008 WL 1991487 (Ala. Civ. App. May 9, 2008).

The Alabama Medical Licensure Commission found Morrison guilty of practicing medicine in a manner that endangered his patients. It

**BALCH & BINGHAM LLP
HEALTHCARE CONTACTS
IN BIRMINGHAM**

Matthew A. Aiken
(205) 226-3425
maiken@balch.com

Cavender C. "Chris" Kimble
(205) 226-3437
ckimble@balch.com

Jack Levy
(205) 226-8750
jlevy@balch.com

1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama
35203-4644

**HEALTH LAW PRACTICE
GROUP MEMBERS
IN BIRMINGHAM**

Matt Aiken
Bert Amason
Bruce Barze
Hamp Boles
Andy Buck
Christie Dowling
Mike Edwards
Robin Franco
Ed Haden
Judd Harwood
Leigh Anne Hodge
Chris Kimble
Jimmy King
Kristen Larremore
Alex Leath
Jack Levy
Colin Luke
John Markus
Carey McRae
Teresa Minor
Dan Murphy
Phil Nichols
Katy Ottensmeyer
Steve Parham
Kimberly Powell
Laura Schiele Robinson
Monica Sargent
Bill Shanks
Pam Payne Smith
Chris Terrell
Craig Williams
Lois Woodward
Chris Yeilding

revoked his license and imposed a fine against him.

Dr. Morrison argued that applying the statute would violate his due process rights because it was impossible to prove that the revocation decision was arbitrary or capricious, or constituted a gross abuse of discretion without the transcript. The court stated the Alabama Legislature intended that a stay be granted only in extraordinary circumstances, such as where a ground for reversal was plain on the face of the revocation order.

Judge Terry A. Moore dissented, arguing that, absent an "opportunity to review the evidence presented to and relied on by the Commission, the circuit court could not determine whether the Commission's order was arbitrary or capricious, was taken without statutory authority, or amounted to a gross abuse of its discretion."

**Clinical Lab's Proposed Arrangement
Raises Kickback Risks**

On May 9, 2008, the Health and Human Services Office of Inspector General ("OIG") released Advisory Opinion No. 08-06, stating a lab company's proposed arrangement of offering free services to dialysis facilities could risk kickback sanctions related to the arrangement. Under the lab's proposal, free test tube and specimen collection container labeling services would be provided to some dialysis facilities. The lab told OIG that its competitors engaged in similar practices.

The advisory opinion said because the dialysis facilities would pay nothing for the labeling services by the lab, the Anti-Kickback Statute safe harbor for personal services and management contracts could not apply because the provider would not be paying fair market value for the services.

Additionally, OIG provided that the inference arises that the free labeling services were intended to influence the selected dialysis facilities choice of a laboratory.

To read more about OIG 08-06, go to <http://www.balch.com/files/upload/AdvOpn08-06.pdf>.

TAX

IRS Releases Draft Instructions for 2008 Form 990

The Internal Revenue Service ("IRS") is seeking public comment on the draft instructions to the 2008 Form 990, the annual return most tax-

exempt organizations must use to report information about their operations in an effort to ensure the final instructions address the needs of the tax-exempt community.

The draft instructions contain a number of new tools designed to make it easier for the organization to answer the questions and to promote more uniform reporting. These tools include a comprehensive glossary of terms; a sequencing list to help organizations determine the order in which to fill out parts of the form; a compensation table to help organizations determine how and where to report items of compensation; and many illustrative examples. These aids were developed in response to comments received last year in connection with the draft Form 990.

Comments are due June 1, 2008. To read more about IRS draft instructions, go to <http://www.irs.gov/charities/article/0,,id=181091.00.html>.

CREDENTIALING

Louisiana Hospital Had No Duty to Disclose Physician's Drug Problem

A federal appeals court ruled on May 8, 2008 that Lakeview Medical Center ("LMC") could not be held liable for patient injuries caused by an impaired physician, Dr. Robert Berry. LMC was sued by Kadlec Medical Center ("Kadlec") for providing a neutral reference for Dr. Berry that did not disclose his history of drug abuse. Dr. Berry was an anesthesiologist who formerly had staff privileges at LMC. *Kadlec Medical Center v. Lakeview Anesthesia Assoc.*, No. 06-30745, 2008 WL 1976591 (5th Cir., May 8, 2008).

The court reached a different conclusion with respect to the liability of Lakeview Anesthesia Associates ("LAA"), the anesthesia practice group that also employed Dr. Berry while he had staff privileges at LMC. The LAA physicians provided a positive reference for Dr. Berry stating they recommended him highly, despite the fact that Dr. Berry was terminated by LAA for using narcotics on the job and putting his patients at risk. The court maintained LAA was subject to liability because their representation that Dr. Berry was an excellent clinician contributed to Kadlec's decision to employ him.

The federal circuit court ruling stated that while hospitals have a duty not to misrepresent the qualifications of former medical staff members, they are not required to divulge negative information. The court concluded in its ruling the defendants did not have a fiduciary or contractual duty to disclose their knowledge of

BB

BALCH & BINGHAM LLP

**BALCH & BINGHAM LLP
HEALTHCARE CONTACT
IN GULFPORT**

H. Rodger Wilder
(228) 214-0412
rwilder@balch.com
1310 Twenty Fifth Ave
Gulfport, MS 39501-1931

**HEALTH LAW PRACTICE
GROUP MEMBERS
IN GULFPORT**

Ann Bailey
Paul Delcambre
Rodger Wilder

**BALCH & BINGHAM LLP
HEALTHCARE CONTACT
IN JACKSON**

David M. Thomas, II
(601) 965-8157
dthomas@balch.com
401 East Capitol Street
Suite 200
Jackson, MS 39201-2608

**HEALTH LAW PRACTICE
GROUP MEMBERS
IN JACKSON**

Armin Moeller
David Thomas

Dr. Berry's drug use, even if they had an ethical obligation to do so, they were also rightly concerned about a possible defamation claim if they communicated negative information.

TORT REFORM

Superior Court Judge Strikes Cap on Non-Economic Damages

In an order signed April 28, 2008, Judge Marvin Arrington struck down Georgia's cap on non-economic damages. *Park v. Wellstar Health System*, No. 2007CV135208. Currently, Georgia laws cap non-economic damages, such as pain and suffering, that can be recovered in a medical malpractice suit at \$350,000.

The case involves a retired restaurant owner, who fell from a ladder at his home and was taken to Wellstar Douglas Hospital by ambulance. He and his wife sued the hospital, two ER physicians and their group, claiming they missed injuries to his spine and neck that resulted in him becoming a quadriplegic.

Judge Arrington held the cap violates the equal protection requirement in the Georgia Constitution by impermissibly singling out one category of professional defendants, medical providers, for special protection. In addition, the court expressed concern that the cap effectively limits the rights of the poor and middle class to recover large damage awards while allowing the wealthy to recover unlimited damages in the form of lost income.

To read more about the case, go to <http://www.fccljudicialsearch.org/Scripts/UVLink.isa/tsgdb1/WEBSERV/PUBCivilSearch?action%253Dview%26track%253D583528>.

COMMENTARY

Time to Revisit Arbitration Clauses? Recent High Courts; Decisions Provide Cautionary Tales

In a recent front-page story, the *Wall Street Journal* (April 11, 2008) reported that "[n]ursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts". The industry began the practice after "a wave of big jury awards in the late 1990s". In the last few decades, there has been a deliberate movement by many other businesses, healthcare providers and payors, financial institutions, insurance companies, and even individual consumers, towards contractual arbitration as the preferred

method of legal dispute resolution. Lawyers differ on whether arbitration delivers the promised benefits of efficiency and finality. However, as businesses have sought to make arbitration a "known" quantity by managing the inherent downside risk with specific contractual language, two significant recent court decisions issued by the Alabama and U.S. Supreme Courts respectively, *Johnson v. Jenkins*, No. 1061760, 1061762, 2008 WL 2068077 (AL May 16, 2008) and *Hall Street Assoc. v. Mattel*, 128 S. Ct 1396, (March 25, 2008), send a clear message that binding arbitration still offers traps for the unwary. In light of these decisions and some recent significant arbitration awards, prudence dictates that contracting parties revisit their arbitration agreements to make an updated a risk/benefit analysis.

The conventional wisdom is that arbitration is cheaper, faster, and more flexible than traditional litigation.

Studies have demonstrated that the majority of lawyers, business people, and individuals who engage in arbitration believe that arbitration offers quantifiable benefits over traditional litigation, including greater cost-efficiencies for the parties and earlier finality of results. Interestingly, surveys also show that the majority of parties who arbitrate, even those on the losing end of a dispute, generally are qualitatively happier with the results originating from the arbitration process than those derived from their past experiences with traditional litigation. In healthcare and other technically challenging fields, parties value having the dispute resolution process overseen by an arbitrator who is an industry-recognized expert in the complex subject matter at hand. Arbitration also offers the added attraction of privacy. Unlike a traditional legal trial, arbitration records generally are available only to the parties themselves.

Even though the Federal Arbitration Act (the "FAA") and state statutes govern the procedures for most arbitrations held in the United States, parties often attempt to craft their own arbitration procedures contractually. Arbitration clauses may seek to limit the relief available to the complaining party by prohibiting certain type(s) of claims from being brought, such as claims for class action status or punitive damages. Such clauses may further prescribe a specific type of appellate review to be employed by a traditional trial court of an arbitration award. However, as the *Johnson* and *Hall Street* courts make clear, parties to a contractual arbitration clause do not have free rein to modify existing arbitral administrative rules and/or the FAA.

**BALCH & BINGHAM LLP
HEALTHCARE CONTACT
IN MONTGOMERY**

J. Dorman Walker

(334) 269-3138

dwalker@balch.com

105 Tallapoosa Street

Suite 200

Montgomery, AL 36104

**HEALTH LAW PRACTICE
GROUP MEMBERS
IN MONTGOMERY**

JoClaudia Moore

Will Sellers

Dorman Walker

**Disclaimer and Copyright
Information . . .**

This publication is intended to provide general information. It is not intended as a solicitation, and in the event legal services are sought, no representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers. The listing of any area of practice does not indicate any certification of expertise in the area as listed. ©2008. Balch & Bingham LLP. All rights reserved.

Ex parte Johnson: Arbitrators may decide if class-action claims can be maintained.

In *Johnson*, two groups of homeowners brought separate claims before the American Arbitration Association (the “AAA”) against the same manufacturing companies associated with the construction of the claimants’ mobile homes. The companies asked the trial courts in the respective counties where the arbitrations had been brought to bar the homeowner groups from bringing claims “on behalf of others similarly situated.” The trial courts granted a stay of arbitration. The homeowners argued that the trial courts lacked jurisdiction to stay the proceedings and that the Commercial Arbitration Rules of the AAA, which the parties had agreed were controlling, provided that only the arbitrator could determine whether claims could proceed on a class basis. The Alabama Supreme Court agreed with the homeowners and noted that “[a]n arbitration provision that incorporates rules that provide for the arbitrator to decide issues of arbitrability clearly and unmistakably evidences the parties’ intent to arbitrate the scope of the arbitration provision.” The Court further noted somewhat vaguely in non-binding dictum that the proper time for the companies to bring an action in court to determine whether Alabama law prohibits class action arbitration is once the arbitrator has allowed the case to proceed as such for some undefined length of time. According to the Court, prior to that time, whatever it may be, no trial court has subject matter jurisdiction over the case to make any rulings related to class action status.

Recently, Verizon Wireless (“Verizon”) learned that meticulously crafted arbitration clauses can backfire. On January 28, 2008, an arbitrator in New York disregarded specific contractual prohibitions against class action claims and certified two subclasses of over 70 million Verizon customers in a dispute over early termination fees. Because *Johnson* is unclear on the point, it is not immediately apparent whether an Alabama company in similar litigation would be able to challenge the class certification immediately or whether, instead, it would be able to challenge the class certification only on an appeal after the final arbitration award is made. Verizon has filed a petition in federal court to vacate the arbitrator’s class action certification. The court currently is taking briefs on whether it has jurisdiction to act.

Hall Street Associates: Parties may not contract around the exclusive standard of award review found in Sections 10 and 11 of the FAA.

In *Hall Street Associates*, the United States Supreme Court granted certiorari to determine

whether the grounds listed in Section 10 and 11 of the FAA for vacation or modification of an arbitration award, such as impartiality, undue influence, corruption, fraud, etc., were exclusive. *Hall Street* and *Mattel* had signed an arbitration agreement that allowed a trial court to vacate or modify any arbitration award under the contract in question if “the arbitrator’s findings were not supported by substantial evidence” or if the arbitrator’s legal conclusions were “clearly erroneous.” Although both parties mutually agreed to this appeal structure, the Supreme Court ultimately ruled that the customized legal review standard in the *Hall Street/Mattel* agreement was unenforceable and that the standards in Sections 10 and 11 of the FAA carried “no hint of flexibility.” For the first time, the Court noted that those sections provide the “exclusive grounds” for modification or vacation of an award. The Court’s decision does leave room for parties to guard against legal error so long as it is done within the statutory framework of the FAA – specifically, parties can expressly agree in the agreement that the arbitrator must follow the law. Left for another day are questions regarding how other common non-statutory grounds for vacation or modification, such as “violation of public policy,” will be pigeonholed into the FAA’s structure.

Arbitration should be seen as an alternative to a traditional trial, not a replacement.

Huge arbitration awards are becoming more and more commonplace. In 2003, Sampo Japan Insurance Inc., received a record \$1.119 billion award against reinsurer Fortress Re. Although few award amounts ever reach that astronomical level, awards approaching or over \$10 million have abounded recently: \$9.0 million in *Bates v. HealthNet* (for rescission of a cancer policy) (2008); \$19.6 million in *Arizona Postal Workers Union v. U.S. Postal Service* (2007); \$27.5 million in *Sawtelle v. Waddell & Reed, Inc.* (2005); and \$40-\$50 million in *O’Connell v. MassMutual Financial Group* (2006), just to name a few. Given the specter of large awards, and the increasing unwillingness of courts to protect the parties from the consequences of their arbitration choices and to uphold their efforts to protect themselves contractually, it is incumbent upon businesses and their counsel to consider the pros and cons of arbitration before reflexively adding boilerplate arbitration clauses to commercial or consumer contracts. In many if not most cases, arbitration does provide a faster resolution and greater efficiencies than the traditional trial and appeal process. But, as *Johnson* and *Hall Street Associates* make clear, those benefits can come with significant risk.