

NOTES AND COMMENTS

If the Shoe Doesn't Fit: Stark's Self-Referral Prohibition and Medicaid Claims

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ABSTRACT: Currently pending before a Congressional subcommittee is the Medicaid Self-Referral Act, which would amend the Social Security Act and extend the Stark law's physician self-referral prohibition to Medicaid claims. The pending legislation begs the question whether Stark's self-referral prohibition, in its current form, applies to Medicaid claims. The Department of Justice answers that question in the affirmative; a view accepted by at least three federal judges. Yet, the Stark law itself, its implementing regulations, and agency guidance suggest that the answer is "no"; Stark's self-referral prohibition applies only to Medicare claims. This article addresses whether Stark's self-referral prohibition applies to Medicaid claims, or whether it is confined to the Medicare context.

KEYWORDS: Stark, Self-referral, Medicare, Medicaid, False Claims Act, FCA, Medicaid Self-Referral Act, CMS

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Grubman: Stark and Medicaid

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Introduction

On May 19, 2014, Representative Jim McDermott (D-WA) introduced the Medicaid Self-Referral Act,¹ which would amend the Social Security Act (SSA) to prohibit payment of a Medicaid designated health service (DHS) furnished to an individual based on a physician's referral if the physician or immediate family member has a financial interest in the furnishing entity.² The law's purpose is to "apply the Medicare restriction on self-referral to State plan requirements under Medicaid."³ In plain terms, the legislation would extend the Stark law's physician self-referral prohibition to Medicaid claims.

That Representative McDermott saw a need to introduce such legislation begs the question whether Stark's self-referral prohibition in its current form applies to Medicaid claims. The Department of Justice (DOJ) answers in the affirmative; a view accepted by at least three federal judges. Yet, the Stark law itself, its implementing regulations, and guidance from the Health Care Financing Administration (HCFA)—the predecessor to the Centers for Medicare & Medicaid Services (CMS)—suggest otherwise.

The Stark Law Statute

The language and placement of Stark's self-referral prohibition suggests it applies only to Medicare claims. The Stark law is contained in the Medicare subchapter of the SSA—Subchapter XVII.⁴ A separate subchapter—Subchapter XIX—covers Medicaid. Stark's self-referral prohibition provides that where a specified financial relationship exists, "the physician may not make a referral . . . for which payment

1 H.R. 4676, 113th Cong. (2014).

2 For the full text of the bill, *see id.*, available at <https://beta.congress.gov/113/bills/hr4676/BILLS-113hr4676ih.pdf>.

3 160 CONG. REC. H4475 (daily ed. May 19, 2014) (statement of Rep. McDermott).

4 42 U.S.C. § 1395nn.

otherwise may be made *under this subchapter*,⁵ and “the entity may not present or cause to be presented a claim *under this subchapter*”⁶ The self-referral prohibition would seem to apply only to Medicare because these provisions are contained in the Medicare subchapter.

This placement also affects statutory interpretation. As the Supreme Court has held, “‘the title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.”⁷ In *Florida Department of Revenue v. Piccadilly Cafeterias*, the Court cited the placement of a statute within a certain subchapter to resolve doubt about the statute’s meaning.⁸ That the self-referral prohibition is contained wholly in the Medicare subchapter and expressly limits its application to services “for which payment may be made under this subchapter” indicates that Congress intended a Medicare-only application.

Stark Regulations

Stark regulations also suggest that the self-referral prohibition is limited to Medicare. Those regulations provide that “a physician who has a direct or indirect financial relationship with an entity . . . may not make a referral to that entity for the furnishing of DHS for which payment otherwise may be made *under Medicare*.”⁹ The regulations further provide that “[a]n entity that furnishes DHS pursuant to a referral that is prohibited by paragraph (a) of this section may not present or cause to be presented a claim or bill *to the Medicare program*. . . .”¹⁰ and that “*no Medicare payment* may be made for a designated health service that

5 *Id.* § 1395nn(a)(1)(A) (emphasis added).

6 *Id.* § 1395nn(a)(1)(B) (emphasis added).

7 *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947)).

8 *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

9 42 C.F.R. § 411.353(a) (emphasis added).

10 *Id.* § 411.353(b).

is furnished pursuant to a prohibited referral.”¹¹ These regulations are consistent with the statutory language applying the prohibition to Medicare, but not with the notion that the prohibition applies to Medicaid.

The definition of “referral” contained in the regulations also indicates a Medicare-only application. “Referral” is defined as (1) “the request by a physician for, or ordering of . . . any designated health service *for which payment may be made under Medicare Part B . . .*”¹² or (2) a request by a physician that includes the provision of any designated health service “for which payment may be made *under Medicare . . .*”¹³ Accordingly, a Medicaid referral is not, by definition, a Stark referral.

Stark II Expansion

Stark II, passed as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993),¹⁴ contained a provision that applies an aspect of the self-referral prohibition to Medicaid, albeit not in a manner that affects providers. Section 1903(s) of the SSA provides:

[N]o payment shall be made to a State under this section for expenditures for medical assistance under the State plan consisting of a designated health service . . . furnished to an individual on the basis of a referral that would result in the denial of payment for the service under subchapter XVIII of this chapter if such subchapter provided for coverage of such service to the same extent and under the same terms and conditions as under the State plan. . . .¹⁵

11 *Id.* § 411.353(c)(1) (emphasis added).

12 *Id.* § 411.351(1)(i) (emphasis added).

13 *Id.* § 411.351(1)(ii) (emphasis added).

14 Pub. L. No. 103-66, 107 Stat. 312 (1993).

15 42 U.S.C. § 1396b(s).

Section 1903(s) does not prohibit physicians from referring Medicaid patients to an entity with which the physician has a financial relationship, nor does it prohibit the entity from submitting claims to Medicaid for services based on such referrals. Instead, Section 1903(s) denies federal financial participation (FFP) payment to a state for services furnished to an individual on the basis of such referrals. This distinction was made clear in the commentary to HCFA's proposed rule implementing Stark II:

[Under Section 1903(s)] [a] State cannot receive FFP for designated health services furnished to an individual on the basis of a physician referral *that would result in a denial of payment under the Medicare program* if Medicare covered the services to the same extent and under the same terms and conditions as under the State Medicaid plan.¹⁶

In its proposed rule, under a section entitled "How the referral prohibition and sanctions affect Medicaid providers," HCFA cited Stark's self-referral prohibition and stated: "[W]e do not believe these rules and sanctions apply to physicians and providers when the referral involves Medicaid services."¹⁷ HCFA stated that Section 1903(s) "is strictly an FFP provision."¹⁸ The proposed rule continued:

Section 1903(s) does not, for the most part, make the provisions in section 1877 [Stark] that govern the actions of Medicare physicians and providers of designated health services apply directly to Medicaid physicians and providers. As such, *these individuals and entities are not precluded from referring Medicaid*

16 Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships, 63 Fed. Reg. 1659, 1662 (proposed Jan. 9, 1998) (to be codified at 42 C.F.R. pts. 411, 424, 435, & 455) (emphasis added).

17 *Id.* at 1704.

18 *Id.*

*patients or from billing for designated health services. A State may pay for these services, but cannot receive FFP for them.*¹⁹

Although the proposed rule was clear that Section 1903(s) was not intended to extend Stark's self-referral prohibition to Medicaid, HCFA failed to address the issue in subsequent phases of the rulemaking process. In its 2001 final rule with comment period (Phase I), HCFA stated only that Section 1903(s) banned FFP for expenditures based on referrals that would result in denial under Medicare and that it intended "to address the effects of the physician self-referral prohibition on the Medicaid program in Phase II of this rulemaking."²⁰ When CMS issued its Phase II interim final rule in 2004, however, it postponed addressing the issue:

We had intended to address in this Phase II rulemaking section 1903(s) of the Act, which applies section 1877 of the Act to referrals for Medicaid covered services . . . However, in the interest of expediting publication of these rules, we are reserving the Medicaid issue for a future rulemaking . . .²¹

CMS noted that "while we have delayed rulemaking with respect to portions of the application of Section 1903(s)(2) of the Act, the fact that most providers and suppliers of Medicaid services also furnish Medicare services means that the Medicaid programs should indirectly benefit from compliance on the Medicare side."²² To date, CMS has

19 *Id.* (emphasis added).

20 Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships, 66 Fed. Reg. 856, 939 (Jan. 4, 2001) (to be codified at 42 C.F.R. pts. 411 & 424).

21 Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase II), 69 Fed. Reg. 16054, 16055 (Mar. 26, 2004) (to be codified at 42 C.F.R. pts. 411 & 424).

22 *Id.* at 16124.

not stated that Stark's self-referral prohibition applies to Medicaid and has yet to retract its guidance to the contrary.²³

The Department of Justice's Position

Despite the lack of statutory or regulatory support, the DOJ takes the position that Stark's self-referral prohibition applies to Medicaid claims. In a Statement of Interest, the DOJ argued that although Stark originally applied only to Medicare, OBRA 1993 extended Stark to Medicaid.²⁴ Interestingly, the DOJ did not argue that Section 1903(s) applied Stark's self-referral prohibition directly to Medicaid. Instead, it used the False Claims Act (FCA) to connect Stark's self-referral prohibition to Medicaid, asserting (i) the FCA prohibits individuals from submitting, *or causing others to submit*, false claims; (ii) providers submit Medicaid claims to the states, which pay the claims and then seek partial reimbursement from the federal government; (iii) the federal government will not reimburse a state for claims based on self-referrals under 1903(s); and, therefore, (iv) the provider causes the state to seek reimbursement from the federal government and violates the FCA by submitting such a claim to a state Medicaid program.²⁵

The DOJ failed to cite the language of HCFA's proposed rule, however, which expressly stated that providers and entities "are *not* precluded from referring Medicaid patients or from billing for designated health services."²⁶ It is difficult to reconcile this language with the DOJ's position that doing so could result in FCA liability. The

23 Further evidence of Stark's Medicare-only application is the fact that CMS's Voluntary Self-Referral Disclosure Protocol, passed as part of the Patient Protection and Affordable Care Act, only allows health care providers to disclose self-referrals related to Medicare claims, not Medicaid claims.

24 United States' Statement of Interest in Response to Defendants' Motion to Dismiss (July 26, 2013), at p. 5, *United States ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654 (S.D. Tex. 2013).

25 *Id.*

26 Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships, 63 Fed. Reg. at 1704 (emphasis added).

statute and regulations merely prevent states from collecting FFP for Medicaid services provided pursuant to a self-referral. They expressly allow states to reimburse providers for such services.

Courts Weigh In

Although the DOJ has pursued numerous Stark Medicaid cases, only three federal district court cases (two from the same district) have addressed this issue directly. In *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, the District Court for the Middle District of Florida adopted the DOJ's position outlined [above](#).²⁷ The *Halifax* court did not hold that Stark's self-referral prohibition applied directly to Medicaid. Instead, the court followed the DOJ's round-about reasoning: "Accordingly, the Plaintiff's theory in regard to the Medicaid claims is that the Defendants caused the state of Florida to submit false claims to the federal government for services furnished on the basis of improper referrals. This allegation is sufficient to survive a Rule 12 (b) (6) challenge."²⁸ Like the DOJ, the *Halifax* court failed to acknowledge HCFA's guidance that providers and entities are not precluded from self-referring Medicaid patients or billing for such services and that states may be reimbursed for them.

Similarly, in *United States ex rel. Parikh v. Citizens Medical Center*, the District Court for the Southern District of Texas adopted the same reasoning advocated by the DOJ and followed in *Halifax*, also ignoring HCFA's guidance.²⁹ In *United States ex rel. Schubert v. All Children's Health System, Inc.*, the Middle District of Florida held that Section 1903(s) expanded Stark's self-referral prohibition to Medicaid.³⁰ The court in *All Children's* found the language in HCFA's proposed rule inapposite

27 *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002 (M.D. Fla. Mar. 19, 2012).

28 *Id.*

29 *United States ex rel. Parikh v. Citizens Med. Ctr.*, 977 F. Supp. 2d 654, 665–66 (S.D. Tex. 2013).

30 *United States ex rel. Schubert v. All Children's Health Sys., Inc.*, No. 8:11-cv-01687 (M.D. Fla. Nov. 15, 2013).

but held that, even if it were controlling, a defendant could still be held liable via the FCA.³¹

At least two other courts have stated in dicta that Stark's self-referral prohibition applies to Medicaid. In *Fresenius Medical Care Holdings v. Tucker*, the Eleventh Circuit Court of Appeals stated that Stark "prohibits physicians from referring their Medicare and Medicaid patients to business entities in which the physicians or their immediate family members have an interest."³² However, the court in *Fresenius* was not asked to address the issue of whether Stark's self-referral prohibition applies to Medicaid and, therefore, this language is non-controlling dicta. *Fresenius* was not even a Stark case as it involved a constitutional challenge to a state self-referral statute.³³ The federal Stark law was mentioned simply by way of background.³⁴

Finally, in *United States v. Rogan*, the District Court for the Northern District of Illinois tied Stark's self-referral prohibition to Medicaid.³⁵ As in *Fresenius*, however, the language of *Rogan* constitutes non-controlling dicta because Stark's applicability to Medicaid was not at issue. The *Rogan* decision also is internally inconsistent, giving a fairly detailed description of Stark's self-referral prohibition, expressly stating the prohibition applies to Medicare, but completely omitting Medicaid.³⁶

This issue has not yet reached the circuit court level. Both *Halifax* and *All Children's* settled without reaching the Eleventh Circuit. Although *Citizens Medical Center* reached the Fifth Circuit, the only

31 *Id.*

32 *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 937 (11th Cir. 2013).

33 *Id.*

34 *Id.*

35 *United States v. Rogan*, 459 F. Supp. 2d 692, 722 (N.D. Ill. 2006).

36 *Id.* at 711–12 ("the Stark Statute . . . prohibits, *inter alia*, a hospital from submitting Medicare claims for payment based on patient referrals from physicians having a prohibited 'financial relationship' . . . with the hospital"; "Stark I applied to referrals of Medicare patients for clinical laboratory services"; "In addition to prohibiting the hospital from submitting claims under these circumstances, the Stark Statute also prohibits payment by the Medicare program of such claims") (emphases added).

issue on appeal was whether the defendants were entitled to qualified immunity as county employees.³⁷ Similarly, the Seventh Circuit's review in *Rogan* was limited to whether the government proved materiality and reliance under the FCA and whether the monetary award was excessive under the Eighth Amendment.³⁸ While the DOJ has been successful in convincing several district court judges to adopt its position on Stark's application to Medicaid, it remains to be seen whether the DOJ's success will continue when the issue finally reaches the circuit court level.

Conclusion

Whether Stark's self-referral prohibition applies to Medicaid claims is more than a matter for academic debate. Health care providers have incurred tremendous liability in Stark Medicaid cases. Notwithstanding the DOJ's position and that of the three district courts that have accepted it, neither the statute nor regulations make Stark's self-referral prohibition applicable to Medicaid. The argument that Stark's self-referral prohibition should apply equally to Medicaid flies in the face of the plain language of the statute and regulations, as well as agency guidance.

37 United States *ex rel.* Parikh v. Brown, No. 13-41088 (5th Cir. Oct. 1, 2014).

38 United States v. Rogan, 517 F.3d 449 (7th Cir. 2008).