U.S. Court of Appeals Reverses Decision Interpreting Stark FMV Standard

On January 21, 2009, The United States Court of Appeals for the Third Circuit issued an opinion in the case of *U.S. ex rel. Ted D. Kosenske, M.D. v. Carlisle HMA, Inc.* (No. 07-4616). The opinion overturned a decision of the U.S. District Court in Pennsylvania, based in part on a determination that the District Court misapplied the fair market value ("FMV") standard under the Physician Self-Referral Statute, commonly known as the "Stark" law.

The case involved the exclusive provision of pain management services at a hospital-owned pain clinic by a group of anesthesiologists. The whistleblower action alleged that the arrangement violated the Stark law on several grounds, including the allegation that compensation for the services was not consistent with FMV.

The Stark law provides the following definition of FMV for service arrangements:

> *"Fair market value means the value in arm's-length transactions, consistent with the general market value. 'General market value' means... the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party... at the time of the service agreement." 42 C.F.R. § 411.351*

In determining the whether the compensation was consistent with FMV, the District Court stated that the arms-length negotiation between the parties was "compelling evidence that the parties engaged in a fair market value exchange." Because it found there was arms-length negotiation, the District Court concluded that "By definition, the terms of the contract reflect the fair market value of the benefits conferred on each party."

The Court of Appeals disagreed with the District Court rationale, ruling that the District Court had misapplied the FMV standard. The Court of Appeals held that,

> *"...as a legal matter, a negotiated agreement between interested parties does not "by definition" reflect fair market value. To the contrary, the Stark Act is predicated on the recognition that, where one party is in a position to generate business for the other, negotiated agreements between such parties are often designed to disguise the payment of non-fair-market-value compensation."*

FMV Pitfall

The Court of Appeals found that, because the parties were in a position to refer to one another, the fact that they engaged in actual arms-length negotiations could not conclusively establish that the compensation was consistent with FMV.