

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

"IT TAKES TWO TO TANGO"

Enforcement Agencies Have A New Focus: Physicians

January 28, 2010

On December 1, 2009 the U.S. Department of Justice ("DOJ") announced that Kerlan Jobe Orthopaedic Clinic, a sports medicine clinic located in Los Angeles, California, agreed to pay the United States \$3 million to settle allegations that Kerlan Jobe received illegal kickbacks from HealthSouth Corporation.¹ The Kerlan Jobe settlement illustrates that the government, having historically focused most of its enforcement efforts on the hospitals and other healthcare facilities accused of paying illegal kickbacks, is now turning its attention to the other side of those financial relationships, i.e., the physicians accused of soliciting and/or accepting illegal remuneration.

As background, in December 2007 HealthSouth agreed to pay \$14.2 million to settle allegations by the DOJ that HealthSouth had paid illegal kickbacks to physicians who referred patients for care in some of its hospitals, outpatient rehabilitation clinics, and ambulatory surgery centers.² The settlement was a result of HealthSouth's self-disclosure of certain financial relationships with physicians, including Kerlan Jobe, in 2004 and 2005 to the U.S. Attorney for the Northern District of Alabama and the Department of Health and Human Services Office of Inspector General ("OIG").

Now, two years after the HealthSouth settlement, the government has turned its focus more closely on the physicians involved in these arrangements. The investigation leading to the Kerlan Jobe settlement was a collaborative effort of the Civil Division of the DOJ, the U.S. Attorney's Office for the Central District of California, and the OIG. Kerlan Jobe settled with the DOJ to resolve allegations that HealthSouth paid kickbacks to Kerlan Jobe in the form of stock option grants, donations to the Kerlan Jobe Foundation, loan forgiveness on an equipment lease,

¹ See "Los Angeles' Kerlan Jobe Orthopaedic Clinic Pays \$3 Million to Settle Kickback Allegations" (December 1, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-civ-1294.html>.

² See "HealthSouth and Physicians Pay \$14.9 Million to Settle Health Care Fraud Claims" (December 14, 2007) available at http://www.justice.gov/opa/pr/2007/December/07_civ_1007.html.

and what was described by the DOJ as "disproportionately high ownership interest in a jointly owned ambulatory surgery center."

As a condition of continued participation in Federal healthcare programs, Kerlan Jobe was required to enter into a Corporate Integrity Agreement ("CIA") with the OIG.³ The CIA is for a term of three years, effective November 25, 2009, and addresses Kerlan Jobe's ongoing financial relationships with referral recipients.

The CIA also includes a list of penalties in the event that Kerlan Jobe fails to comply with the terms of the CIA. The penalties range from monetary penalties calculated on a daily rate based on non-compliance to exclusion from participation in Federal healthcare programs for a material breach not cured within the 30 day cure period.

The Kerlan Jobe settlement illustrates the evolving trend towards enforcement actions against not only hospitals and other healthcare facilities who are part of allegedly improper financial arrangements with physicians, but also against the physicians themselves. While it is difficult to predict the frequency of such enforcement actions in the near future, the government appears to be sending a message to the healthcare industry that "under the anti-kickback statute and Stark self-referral law, it takes two to tango."⁴ If you have any questions on this Health Law Update, please contact any of the attorneys in our Healthcare Practice Group listed below.

³ Corporate Integrity Agreement between OIG and Kerlan Jobe available at

http://oig.hhs.gov/fraud/cia/agreements/Kerlan_Jobe_orthopaedic_clinic_11252009.pdf

⁴ See Blesch, Gregg "Making Them Pay - High-Cost of Healthcare Reform is Fueling More Fraud Enforcement, Putting Hospitals, Physicians, Other Providers on Notice," Modern Healthcare, (October 12, 2009), quote from Lewis Morris Chief Counsel with OIG, available with subscription at <http://www.modernhealthcare.com/apps/pbcs.dll/article?AID=/20091012/REG/910099990>

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