Maryland Court of Appeals decision in 

By Laura L. Katz and Jacqueline L. Allen

**SUMMARY**

The decision of the Maryland Court of Appeals in *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*, confirms that health care practitioners who have a beneficial interest in a practice, are prohibited from referring patients to another practitioner in that practice for the provision of MRI, CT or radiation therapy services. Most significantly, the Court affirmed the Board’s interpretation of Maryland’s self-referral law that no other exception would permit an orthopaedic surgeon’s referral of a patient to another health care provider in the same group practice for the furnishing of MRI or CT diagnostic services that involve the use of a machine in which the physician’s practice has a beneficial financial interest.

**WHAT HAPPENED?**

On January 24, 2011, Maryland’s highest court issued its long awaited opinion in *Potomac Valley Orthopaedic Associates v. Maryland State Board of Physicians*. In essence, the Maryland Court of Appeals ruling upholds the Maryland Board of Physicians’ (“Board”) conclusion that the in-office ancillary services exception under Maryland’s self-referral law does not cover referrals for MRI, CT or radiation therapy services. Most significantly, the Court affirmed the Board’s interpretation of Maryland’s self-referral law that no other exception would permit an orthopaedic surgeon’s referral of a patient to another health care provider in the same group practice for the furnishing of MRI or CT diagnostic services that involve the use of a machine in which the physician’s practice has a beneficial financial interest.
WHAT IS THE IMPORT OF THE COURT’S DECISION?

The Court of Appeals decision in Potomac Valley is highly significant for several reasons. First, except for a radiologist group practice or an office consisting solely of one or more radiologists, Maryland health care practitioners who have an ownership interest in a group practice and have referred patients to another practitioner in the same group practice for MRI, CT or radiation therapy services, will no longer be able to do so under the in-office ancillary services exception, group practice exception or direct supervision exception to Maryland’s self-referral law.

If practitioners continue to make such self-referrals, they could be subject to various penalties, including, but not limited to, a fine, disciplinary action by the appropriate state regulatory board, and having to make a refund of the payment, or non-payment, for the services provided.

Further, arrangements involving a health care practitioner’s referrals will now have to be examined within the framework of the Board’s narrow reading of the potentially applicable exceptions to Maryland’s self-referral prohibition. The result may well be that an arrangement which passes muster under the federal prohibition on self-referrals (commonly referred to as the “Federal Stark Law”) may not be permissible under Maryland law.

BACKGROUND

Maryland law on patient referrals, in pertinent part, prohibits a health care practitioner from referring a patient to a health care entity in which the practitioner owns a beneficial interest, unless an exception applies. The law has been subject to various questions and challenges.

Potomac Valley arose out of a 2006 Declaratory Ruling issued by the Board in response to two formal petitions separately filed by CareFirst BlueCross BlueShield and The Injured Workers’ Insurance Fund requesting that the Board issue a ruling on the propriety of referrals made by physicians for MRI scans, when the referring physician has a financial interest in the performance of the scan.

The Declaratory Ruling addressed the following three potentially applicable exceptions to Maryland’s self-referral prohibition based upon the facts of the case:

1. Section 1-302(d)(2) (referred to as the “group practice exception”), which provides that Maryland’s self-referral prohibition does not apply to “a health care practitioner who refers a patient to another health care practitioner in the same group practice as the referring health care practitioner”;

2. Section 1-302(d)(3) (referred to as the “direct supervision exception”), which provides that the self-referral prohibition does not apply to “a health care practitioner with a beneficial interest in a health care entity who refers a patient to that health care entity for health care services or tests, if the services or tests are personally performed by or under the direct supervision of the referring health care practitioner”; and

3. Section 1-302(d)(4) (referred to as the “in-office ancillary services exception”), which provides that the self-referral prohibition does not apply to a health care practitioner who refers in-office ancillary services or tests that are: (i) personally furnished by (a) the referring health care practitioner; (b) a health care practitioner in the same group practice as the referring health care practitioner; or (c) an individual who is employed and personally supervised by the qualified referring health care practitioner or a health care practitioner in the same group practice as the referring health care practitioner; (ii) provided in the same building where the referring health care practitioner or a health care practitioner in the same group practice as the referring health care practitioner furnishes services; and (iii) billed by the health care practitioner performing or supervising the services or a group practice of which the health care practitioner performing or supervising the services is a member.

Maryland law expressly excludes MRI, CT and radiation therapy services from the definition of in-office ancillary services, except for an office of radiologists or an office consisting solely of one or more radiologists.
Central to its ruling, the Board concluded that none of these exceptions to Maryland's self-referral prohibition apply to the facts because:

(i) the group practice exception was intended for referrals that transfer professional responsibility for a patient's continued care, permanently or temporarily, from one health care practitioner to another practitioner within the same group practice and does not exempt referrals for specific "services or tests" already chosen by the referring physician;

(ii) the direct supervision exception creates an exemption for referrals for services or tests to a health care entity that is outside the referring practitioner's practice, only if the physician is personally present in the treatment area when the service is performed and either personally provides or directly supervises the services; and

(iii) the in-office ancillary services exception did not apply because the definition of in-office ancillary services explicitly excludes MRI, CT and radiation therapy services, except for services provided by a radiologist group practice or a practice or office consisting solely of one or more radiologists.

The Board's Declaratory Ruling was appealed to the Circuit Court for Montgomery County, which affirmed the Board's interpretation of the law. Twelve diversified physician practices then noted an appeal to the Court of Special Appeals. Thereafter, prior to any party filing a brief with the Court of Special Appeals, the Court of Appeals issued a writ of certiorari on its own initiative.

Relying upon the legislative history of Maryland's self-referral law, well-established rules of statutory construction, prior Opinions of the Attorney General and the General Assembly's rejection of bills introduced during the period from 2007 through 2010 that would have changed Maryland's self-referral law, the Court of Appeals held that the Board's Declaratory Ruling was not premised upon an erroneous conclusion of law and affirmed the judgment of the Circuit Court.

This Alert was written by Laura L. Katz, a member of the firm's Health Law Practice Group and Jacqueline L. Allen, a member of the firm's Business and Finance Department. Laura can be reached at 410.332.8804 or lkatz@saul.com. Jacqueline can be reached at 410.332.8651or jallen@saul.com. This publication has been prepared by the Health Law Practice Group for information purposes only.

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