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WILL YOU PAY THE PRICE FOR AN ASC DEAL GONE WRONG?

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Its run has been only about half as long as the television series “Law & Order,” but the New York courtroom drama of anesthesiologist Kevin Glassman, MD, in *Glassman v Pro Health Ambulatory Surgery Center* has not been cancelled yet.

The facts of this case illustrate the lessons to be learned about the relationship between anesthesiologists and facilities, especially ambulatory surgery centers.

Beginning in 1998, Dr. Glassman was employed by Pro Health, the owner of an ambulatory surgery center (ASC), to be the facility’s medical director and director of anesthesiology. His employment agreement required him to turn over to Pro Health all fees earned from providing anesthesia services, whether at the ASC or from outside work. Similar provisions appeared in the employment agreements of other anesthesiologists at Pro Health. Those professional fees were to form part of a pool of anesthesia fees to be shared by Dr. Glassman and his colleagues.

Later, Pro Health stopped paying a share of the pooled fees to Dr. Glassman. Dr. Glassman began to withhold a portion of the fees that he earned from outside work. In 2001, Pro Health demanded that Dr. Glassman and the other anesthesiologists who worked for Pro Health at the ASC amend their employment agreements to exclude the physicians from sharing in the pooled funds. Dr. Glassman refused to enter into the amendment and was fired.

Dr. Glassman sued for breach of contract, asking for unpaid wages, contractually mandated severance pay and related damages. Pro Health tried to bring a counterclaim for the outside fees that Dr. Glassman withheld, but the trial court would not permit it, holding that it was illegal for Pro Health to share in Dr. Glassman's outside fees because Pro Health's operating certificate permitted the company to provide medical services at its ASC only. Pro Health appealed, but the appeals court agreed with the ruling of the trial court.

Pro Health, seeking to escape any liability to Dr. Glassman, then argued that the entire contract was unenforceable on the grounds that it included an illegality (the shared fees provision the court struck down). The trial court disagreed. It "severed" the illegal outside fees provision from the remainder of the agreement and subsequently ruled in favor of Dr. Glassman on his claims, awarding him nearly $750,000 in lost wages and related damages.

Pro Health appealed that decision to the first-level appellate court, which once again ruled in Dr. Glassman's favor, holding that the illegal outside fees provision did not taint the entire agreement.

Refusing to accept defeat, Pro Health took its case to New York's high court, the Court of Appeals. The high court reversed the intermediate court's decision, on the grounds that the contract violation was of the type considered a mere prohibition—not the more serious type, a violation of societal rules—and

therefore did not disqualify the company from seeking a legal remedy, and allowed Pro Health to pursue its claim.

The high court also noted that New York law gave regulators the power to take action against ASC licensees for breaking licensing laws and to impose sanctions on physicians for fee splitting, but no regulatory action had taken place.

The next, but perhaps not the last, episode of this case will take place in the trial court, which will determine the outcome of Pro Health's claim for the withheld outside fees.

The Larger Lessons

The outcome of the Glassman case obviously depends on issues of New York law and the specific facts involved. However, the case highlights larger issues: the scope and legality of the arrangement between anesthesiologists and facilities, especially ambulatory surgery centers and their owners.

Although most of these centers and their operators are not involved in flouting the law, it is not uncommon in practice, based on decades of experience representing anesthesiologists, to see ASC deals that are more aggressive than those proposed by hospitals. (Hospitals have been known to overreach, as well.)

The initial question for anesthesiologists to ponder in considering a proposed arrangement is the essential nature of their relationship with the facility and its owners—who often are surgeons. The next question to consider is whether the proposed flow of cash is consistent with that true nature and with applicable state and federal laws.

For example, does the deal create a true employment or subcontract relationship with an entity that may legally employ or engage an anesthesia provider in that state? How is compensation set? What work does it include? Does the anesthesiologist forfeit interest in work that the employer/principal does not or cannot legally control? Is compensation fixed? Is there a productivity bonus, for all work, both at the facility and outside of it? Is that compensation below fair market value? Will anesthesiologists be independent contractors subject to management by the ASC or its owners—and does that oversight come at the price of a management fee? If so, is the fee, or any other payment or withholding, in excess of the fair market value for what the anesthesiologists receive?

The Glassman case demonstrates that even though a deal may be, on some levels, illegal, its terms may nonetheless be enforced against the interests of the aggrieved party. And involvement in an illegal deal may lead to a regulatory or even criminal proceeding based on violations of fee splitting and anti-kickback laws.

To put this into perspective, during recent months I've seen the spectrum of offered ASC deals:

- A deal in which a group of anesthesiologists would provide services at an ASC and do their own, independent billing and collection without financial involvement, in any sense, from the facility.

- A deal in which an anesthesiologist would be employed full-time by a surgical group to provide services at an ASC in return for fixed compensation plus a bonus.

- A deal in which an anesthesiologist was to provide services at an ASC as an independent contractor, in return for which a significant percentage of the physician's collections, from ASC work as well as for

totally unrelated outside work, was to be shared with the ASC's manager, who was to provide, in exchange, management services.

- A deal in which the anesthesiologist was being forced to form a new professional corporation, to be 49% owned by the retired physician-owner of the ASC. The corporation would then employ the anesthesiologist in respect of all of his services, both at the ASC and at other facilities, with the income being split proportionate to ownership.

As the health care reform law exerts more downward pressure on facility reimbursement, less scrupulous ASC operators likely will seek more aggressive deals, attempting to profit from the provision of anesthesia services. At the same time, scrutiny of compliance with laws regarding fraud and abuse is sure to increase. To add insult to injury, an improper deal—even one that results in regulatory action or even criminal prosecution against you—may be economically enforceable by the ASC.

Proceed with caution. Yes, you need a job. But try to make sure it's not making license plates, with a lien against those wages in favor of your former ASC.

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