



SEPTEMBER/OCTOBER 2007

ARMSTRONG TEASDALE NAMED AS A "BEST LAW FIRM FOR WOMEN"

Armstrong Teasdale is pleased to announce that *Working Mother* magazine and Flex-Time Lawyers LLC have named the firm among the 2007 *Working Mother* & Flex-Time Lawyers Best Law Firms for Women. Nationally, fifty law firms were honored for their commitment to the retention and advancement of female lawyers.

Armstrong Teasdale's Professional Advancement of Women Program is at the forefront of providing a supportive environment for female lawyers, one that actively presents women in realizing their full potential for excellence, creativity and initiative in their legal careers, and provides rich opportunities for client growth and development. In support of this initiative, Armstrong Teasdale provides opportunities such as enhanced mentoring, business development coaching, leadership training, networking events, educational programs, and flexible work schedules to allow for a better balance of work and family. All of these initiatives are directed towards the firm's female lawyers at every level of practice.

Law firms were evaluated in six measured areas: workforce profile, benefits and compensation, parental leave, childcare, flexibility, and retention and advancement of women.

LISTED AS THE #1 LAW FIRM IN MISSOURI

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Armstrong Teasdale LLP was recognized as the #1 law firm in Missouri by *The Best Lawyers in America® 2008*. Sixty-five Armstrong Teasdale partners have been chosen, more than any other Missouri law firm. In addition, Armstrong Teasdale was selected by *Best Lawyers* as the top firm in Missouri for Insurance Law, Labor and Employment, and Personal Injury Litigation. This selection was based on the number of Armstrong Teasdale lawyers listed in each of those practice areas. Thirty-five lawyers were selected from the Business Services Department.

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HEALTH CARE
CMS Issues Final Stark III Regulations
Piran Farhadieh

The Centers for Medicare and Medicaid Services (“CMS”) has released Phase III of the physician self-referral rule, commonly referred to as the Stark Law. The Phase III final regulations were published in the September 5 *Federal Register* and will be effective ninety (90) days after the date of publication, e.g. December 2007. The Phase III regulations finalize the Phase II interim rule that was published on March 26, 2004, which set forth the self-referral prohibition and applicable definitions, interpreted various statutory exceptions and created additional regulatory exceptions.

In general, the Stark Law:

1. Prohibits a physician from making referrals for certain “designated health services” payable by the Medicare program to an entity with which the physician (or an immediate family member) has a financial relationship, unless an exception applies; and
2. Prohibits the entity from filing claims with the Medicare program (or billing another individual, entity or third party payer) for those referred services.

The Stark Law also created a number of narrowly defined regulatory exceptions for arrangements that do not pose a risk of federal healthcare program or patient abuse. Arrangements that meet an exception will be deemed by regulators to be in compliance with the Stark Law.

According to the 516 page display copy that was posted on CMS’ website, the Phase III final rule does not create any new exceptions. In fact, CMS stated that, in general, the final rule reduces “the regulatory burden on the healthcare industry through the interpretation of statutory exceptions and modification of the exceptions that were created using the Secretary of the Department of Health and Human Services’ discretionary authority....” Although no new exceptions were created, CMS has made changes to certain arrangements that are currently allowed under Stark. The following provides a brief summary of the changes made to three of the more commonly used Stark exceptions.

Indirect Compensation Arrangements Exception

CMS explains in the final rule that the relationship between the physician and his or her practice organization is disregarded and the physician “stands in the shoes” of his or her physician organization. This change eliminates the indirect compensation exception for physicians who contract with a designated health services entity through

their physician practice. Therefore, numerous arrangements that would have constituted indirect compensation arrangements if analyzed under Phase I or II of the Stark Law will now be deemed to be direct compensation arrangements and must be analyzed as such. As a result, such arrangements must comply with at least one of the remaining exceptions.

It is important to note that although the “stand in the shoes” provisions are applicable as of the effective date of the Phase III final rule, existing arrangements need not be amended during the original or current renewal term of the contract to comply with the Phase III final regulations. However, these arrangements will need to be evaluated and possibly restructured upon expiration of the original or current renewal term.

Physician Recruitment Exception

CMS made numerous changes to this Stark regulation. Several aspects of the recruitment exception have been relaxed for hospitals and recruits in rural areas. They are as follows:

1. The “geographic area served by the hospital” into which a recruit must relocate his or her medical practice is now defined as the contiguous zip codes from which the hospital draws 90% of its inpatients as opposed to 75% for urban hospitals;
2. A recruit can relocate his or her medical practice outside of the “geographic area served by the hospital” if the hospital obtains an advisory opinion confirming the demonstrated need for the recruit in that location; and
3. The limitation to only “additional incremental expenses” in income guarantee calculations is relaxed if the recruit is replacing a physician who, for the 12 months prior, retired, relocated or died. In these situations, the income guarantee calculation can alternatively include the lesser of either:
 - a. The recruit’s per capita share of total expenses; or
 - b. 20% of the total expenses.

With regards to relocation expenses, a recruit does not have to meet the relocation requirement if he or she was employed full time for *at least two years immediately prior to the recruitment arrangement by a federal or state*

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prison, by a government agency that serves active or veteran military personnel or by a facility of the Indian Health Service. Also, a recruit can be exempted from the relocation requirement if it is deemed in a Stark advisory opinion that the recruit does not have an established medical practice that serves or could serve a significant number of patients of the recruiting hospital.

CMS also revised the prohibition against “additional practice restrictions” to now prohibit “practice restrictions that unreasonably restrict the recruited physician’s ability to practice medicine in the geographic area served by the hospital.” The preamble to the Phase III final rule continues to indicate that non-compete covenants would not be allowed. However, it does allow for reasonable, predetermined liquidated damages clauses. It further clarified that a hospital could permissibly reimburse a group practice for headhunter fees, tail malpractice insurance from the physician’s prior practice, moving expenses, airfare, hotels and other costs with visits by the recruited physician and his or her family. However, CMS expressly declined to modify the Stark exception to allow a hospital to assist a physician practice in recruiting a non-physician practitioner, stating that such arrangements have a risk of abuse.

Personal Services Arrangements

CMS made several changes to the personal services exception. The most significant change is that a “safe harbor” to the definition of “fair market value” within the personal service arrangements exception was eliminated. The safe harbor protected hourly compensation if the amount was based on either the average hourly rate for emergency room physicians in

the relevant market, where there were at least three hospitals providing emergency room services or the average of the 50th percentile national compensation level for physicians in the same specialty, using at least four of six specific salary surveys, then dividing the average by 2,000 hours to establish an hourly rate. CMS eliminated this safe harbor since it determined that calculating fair market value using these methodologies was not practical. Although this safe harbor was eliminated, CMS will continue to scrutinize the fair market value of arrangements as fair market value is an essential element of many exceptions.

CMS also revised the personal services arrangements exception to allow a “holdover” for an expired agreement so long as the terms of the original agreement were followed, for up to six months following expiration.

Other Revisions

CMS also made revisions to the physician retention, rental of office space and equipment, nonmonetary compensation, professional courtesy, charitable donations by a physician, compliance training and fair market value compensation exceptions. These changes, as well as the ones described above, can have a significant impact on existing contractual arrangements that are deemed to be in compliance with Stark prior to the release of the Phase III final rule.

Therefore, it is important to have any current contractual arrangement that implicates Stark evaluated to determine whether any modifications are necessary to be in compliance with the requirements prescribed pursuant to the new Phase III final rule.

STRATEGIC SERVICES

Private Target M&A Deal Point Study Released

Mark Stoneman

I recently completed my participation as a member of the working group for the 2007 Private Target Mergers and Acquisitions Deal Points Study (the “Study”). The Study is a project undertaken periodically by the Committee on Negotiated Acquisitions, which is a part of the American Bar Association’s Business Law Section. As in past years, the Study seeks to examine the degree of uniformity that exists with respect to acquisition agreements involving privately held target companies. The sample agreements are publicly available and, in large part, were taken from deals involving public company acquirers that were forced to disclose the acquisition agreements in their own public filings. While the initial sample included 269 agreements, this was whittled down to a sample size of 143 acquisition agreements to exclude “unusual” transactions such as those involving a bankruptcies, reverse mergers or other similar matters. Out of this reduced sample size, transactions were represented with sales prices ranging from \$25 million to \$500 million dollars. Moreover, the sample represented transactions from various industries.

Many who have been involved in these types of transactions know that it is not uncommon for negotiations to devolve into a debate as to what is “customary” or “typical” in acquisition deals. To some degree, the purpose of the Study is to inform this debate. To a lesser degree, the Study helps to confirm that the debate itself may be

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irrelevant as, in many instances, the Study shows that there is not necessarily a customary or typical provision that is used with anything nearing uniformity.

The focus of my involvement in this study was examining the financial representations in the sample agreements. Some of the results in this area seemed to clearly indicate changes in past years related to issues most closely identified with the Sarbanes-Oxley legislation. For example, a full 75% of the deals in 2006 required a "fair presentation" representation that was not qualified by reference generally accepted accounting principles. While this is a substantial portion of the deals, it is notable that this is a reduction from 84% of the deals in the 2004 study that included the same unqualified representation. This suggests that some of the Sarbanes-Oxley fervor may be dissipating in this area. On the other hand, internal controls representations of the type contemplated by the securities laws were present in 45% of the transactions in 2006, as opposed to only 32% of the transactions from the 2004 study. Other issues that are not as directly associated with the Sarbanes Oxley-legislation were more consistent between the 2004 and 2006 studies. For example, buyer-favorable representations concerning undisclosed liabilities were fairly consistent between the two studies with roughly two-thirds of the agreements in each study containing "buyer-favorable" representations on this point.

In addition to carefully examining representations with respect to financial statements, the Study examined numerous other aspects of negotiated deals. Examples of other provisions examined in the process of preparing the Study include purchase price adjustments, earn-outs, closing conditions, indemnification limitations, and dispute resolution procedures. The Study allows some conclusions with respect to each of these matters. For example: (a) purchase price adjustments were most frequently based upon working capital figures (rather than earnings, debt, equity or other similar metrics); (b) while deals including "earn-outs" were in the minority, most of those deals with earn-outs did not include a covenant by the buyer with respect to its operation of the business after closing; (c) a large majority of the deals included a "material adverse change" provision as an express condition to closing (notably, the Study also acknowledged the existence of implied or "backdoor" material adverse change clauses); (d) legal opinions by the target's counsel were required in fully 70% of the transactions examined; (e) for indemnification purposes, the most commonly chosen survival period was one lasting 18 months (the Study also examined the various "carve-outs" to these survivability limitations and identified the frequency with which each of these appeared within the study group); and (f) the indemnification provisions available to purchasers continued to have a significant number of variables and subordinate variables, such that it would be very difficult to speak of "customary" indemnification terms.

While the above is a representative sampling of the types of statistics compiled by the Study, the Study is itself very comprehensive and the data from the Study has been compiled into a series of 82 slides, many of which will be presented at the annual meeting of the American Bar Association later this fall. The Study itself will, however, continue to be updated throughout the year as members of the working group are continuing to examine the sample agreements in further detail. The results of this additional examination will result in supplements or updates to the Study that will be produced by members of the working group throughout the year. If you are interested in obtaining a copy of the Study or the Study's conclusions with respect to a particular deal point, please contact Mark Stoneman at ext. 7430.

TECHNOLOGY & LICENSING

Guidelines for Valid Online Deals

David Jennings

For many clients and lawyers, the law around the formation and enforceability of e-contracts presents itself as an unknown or a mixed bag. How much notice is enough? What does valid assent really look like? And how exactly must online terms must be presented? The case law yields a patchwork of often non-uniform, if

not conflicting, views. What has become more clear due to recent case law in this area is that the components of an online contract and the totality of factors leading to assent are more important to contract enforceability than any specific combination of clicks and links.

Members of the Business Law Section's Cyberspace Law Committee of the ABA, who have been following the case law and developing e-contracting guidelines for the past six years, have set out four recommended steps to ensure valid e-contract formation. The four steps are:

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1. The user must have adequate notice that the proposed terms exist.
2. The user must have a meaningful opportunity to review the terms.
3. The user must have adequate notice that taking a specified, optional action manifests assent to the terms.
4. The user must, in fact, take that action.

Adequate Notice. In reality, electronic contracts aren't that different from paper contracts with respect to notice of terms. The fundamental question is, "Would a reasonably prudent offeree understand what the terms were?" Generally the contract terms should be immediately visible to potential customers. This can be accomplished either through a window that customers must go through or with a clearly labeled and readily accessible hyperlink. In addition, timing is important in that the terms must be visible before assent is given. For example, it has been held that that a customer can not be bound to license terms governing a software download that were not visible until the download was complete. Unless a customer has reason to know what the terms are even without seeing them, failure to provide terms up front can render the contract unenforceable.

Opportunity to Review. The opportunity to review the terms of the contract can mean more than just seeing the terms, and the circumstances of the presentation of the terms can be important. The customer should be able to read the terms at their own pace, and a one-time opportunity to review may put the contract at risk. Accordingly, pop-up windows are discouraged as a sound way to display terms because they may be deemed to be too temporal. After a customer closes the box, the terms can be difficult to find again, which makes

comparison shopping and careful review cumbersome. There is also a potential risk that pop-up blockers increase the possibility that the terms may not even be seen.

Assent. Assent by the customer must be intentional. Not only must the customer have adequate notice and clear presentation of the terms of the contract and an opportunity to review those terms, the customer must also be made aware that taking a specified action will effectively assent to the proposed contract terms. This specified action can be a click to download or a clicked "I Agree" button. The safe rule-of-thumb in this context is that it must be an action that the customer wouldn't have to take and wouldn't take automatically. If the validity of your contract is challenged, you are going to have to prove that each user actually took action to assent, in other words, you are going to have to demonstrate that the customer either clicked the box, or saw the terms and continued anyway. In this context, retaining old versions of Web sites may be critical.

Another area of concern related to formation of a valid e-contract is the ability to modify these contracts. A quick review of any example online set of terms and conditions will reveal that they often include language providing unilateral powers of modification. The enforceability of this right of unilateral modification was the subject of the Ninth Circuit's decision in *Douglas v. US. District Court for the Central District of California*, No. 06-75424 (9th Cir. July 17, 2007) (12 ECLR 696, 8/1/07). This was the first federal circuit opinion looking at the modification of online terms.

The Ninth Circuit held in *Douglas* that a customer was not bound by contract modifications that were posted on a corporate Web site, but never expressly disclosed to the customer.

The Ninth Circuit held that contract modifications were unenforceable because the customer was not notified of the modifications, even though they were posted online. Apparently, the *Douglas* plaintiff was able to establish that he did not regularly visit the website where the terms were posted. Just as customers must have notice when an e-contract is being formed in the first place, the customer must have adequate notice of the proposed terms in a modification, and that notice must say what exactly has changed, or must direct customers to a clear view of what the modification actually does.

While the court held in *Douglas* that the contract modification was invalid because the customer did not have notice of the modification, it also suggested that mere notice might not be sufficient if the specific changes were not made clear, saying, "Without notice, an examination would be fairly cumbersome, as [the customer] would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed."

Reliance on a perceived right to unilaterally modify terms without notice should probably be discouraged. In *Douglas*, the customer's original contract included language that seemed to provide for the right to change the terms at any time. The Ninth Circuit did not consider this language, which may be significant, indicating the possibility that statements such as "terms subject to change without notice" are not enforceable.

Other considerations for companies modifying their online contracts include keeping a record of all dates and means of posting notices of changes, with special consideration to the underlying relationship being modified and the other party's position and relative knowledge of the contract.

IN-HOUSE MONTHLY CLE PROGRAMS

Upcoming Presentations and Programs

Armstrong Teasdale CLE programs are held on the fourth Thursday of each month at 11:45 a.m. in the training room on the 8th floor.

October 25, 2007

John Cowling and Dan Nelson, "Electronic Discovery"

November 15, 2007

Jerry King, "Fire and Explosion"

Recent Presentations and Programs

June 28, 2007

Jarrod Sharp and Mary Machon, "Contracts: Reviewing Contracts and Drafting Amendments, Waivers & Consents"

July 26, 2007

Jay Summerville, "New Conflicts Rules"

August 23, 2007

Frank Pellegrini, "OSHA Overview"

September 27, 2007

Joe von Kaenel, "Opinion Letters and Audit Responses"

If you have any questions regarding this material, please do not hesitate to call your regular Armstrong Teasdale contact or any of the Practice Area Leaders noted on the first page.

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