



## Client Alert

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### **Nursing Home Pharmacy Consultant Services Under Close Scrutiny**

The federal government's recent settlement with the nation's largest long-term care pharmacy provider, Omnicare, sends a signal to the industry that pricing for pharmacy consultant services will be subject to greater scrutiny under the anti-kickback statute.

On November 3, 2009, the U.S. Department of Justice announced a \$98 million omnibus settlement agreement with Omnicare to resolve a variety of claims, including allegations that Omnicare purchased a medical supply business at an above-market price to induce referrals; allegedly received improper payments from pharmaceutical manufacturers; and purportedly provided consultant pharmacist services to customers at below cost and fair market value to induce referrals.

While the parties stipulated that the settlement was not an admission by Omnicare, the government's theory of liability regarding pharmacy consultants was spelled out clearly in the settlement agreement:

Omnicare knowingly submitted, or caused to be submitted, drug reimbursement claims to Medicaid and Medicare that were false or fraudulent because they resulted from remuneration that Omnicare provided to nursing homes in the form of consultant pharmacist services at rates below Omnicare's cost of providing the services and below fair market value . . . , in violation of the Anti-Kickback Statute. . . . In order to induce nursing homes to enter into contracts with Omnicare to use Omnicare's dispensing pharmacist services and to purchase drugs from Omnicare, Omnicare offered, and nursing homes accepted, consultant pharmacist services at rates below Omnicare's cost of providing the services and below fair market value. Omnicare and nursing homes then entered into separate consultant pharmacist services contracts.

(Nov. 2, 2009, Omnicare Settlement Agreement, ¶ 3.)

As the excerpt above indicates, the government invoked the anti-kickback statute as the mechanism for alleging False Claims Act liability. Although this aspect of the government's complaint did not include claims against any nursing homes, the government's utilization of the anti-kickback statute for pharmacy consultant services could foreshadow an expansion of the government's theory beyond just the pharmacy service providers to the nursing homes as well.

The anti-kickback statute and its accompanying regulations make it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of services which may be reimbursable in whole or in part by federal health care programs (e.g., Medicare or Medicaid). See 42 U.S.C. § 1320a-7b(b); 42 C.F.R. Part 1001. Where remuneration is paid or received with the intent to induce or reward referrals, the anti-kickback statute can be violated. The statute has been broadly interpreted to cover any arrangement where only one purpose of any number of purposes of the remuneration was to reward the referral of services or to induce further referrals. See *United States v. Katz*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985). Thus, the next evolutionary step may be for either the government or a *qui tam* relator to allege that nursing homes, as recipients of consultant services at rates below fair market, are potentially violating the anti-kickback statute and triggering False Claims Act liability.

*What does the Omnicare settlement mean for pharmacy providers and nursing homes?* The government's pharmacy consultant allegations in Omnicare case should serve as a catalyst for both pharmacy providers and nursing homes to reexamine their existing relationships to ensure that pharmacy consultant services are being provided on a fair market basis and without regard to the referrals generated by the nursing homes.

Although its settlement is complete, Omnicare's codefendants in one of the cases continue to defend themselves aggressively. On the same day that it announced its settlement with Omnicare, the Department of Justice unsealed a *qui tam* complaint in which the United States alleged that Omnicare conspired with certain nursing home chains to pay for the right to continue providing pharmacy services in the nursing homes. The remaining defendants vigorously deny those allegations. A team of AGG attorneys – Glenn Hendrix, Bill Kitchens, Aaron Danzig, Jason Bring, and Jerad Rissler – have been defending one of the corporate defendants in the ongoing litigation. AGG recently filed a motion to dismiss all of the government's claims, and the other remaining defendants filed similar motions.

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