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PROFESSIONS AND BUSINESSES

Patient Self-Referral: Prohibit Referral of Patients by Health Care Providers to Entities in Which the Provider Holds an Investment Interest

CODE SECTIONS: O.C.G.A. §§ 43-1B-1 to -8 (new)
BILL NUMBER: HB 920
ACT NUMBER: 360
SUMMARY: The Act prohibits a health care provider from referring a patient to an entity providing health care services when the referring provider holds an investment interest in that entity. A transition period extending until July 1, 1996 is provided for those investment interests acquired prior to July 1, 1993. During this time, an otherwise prohibited referral may be made if specified disclosures are provided to the patient. After July 1, 1996, a referral is prohibited unless there is demonstrated community need for the entity and other investment and referral criteria are satisfied.
EFFECTIVE DATE: July 1, 1993

History

A potential conflict of interest exists whenever a health care provider has a financial interest in a facility to which he or she refers patients.¹ These arrangements may lead to increased use of services and incur unnecessary costs.² This pattern has been confirmed by studies in other states.³ While no studies regarding physician self-referral are

1. Telephone Interview with Rep. Jimmy Skipper, House District No. 137 (Apr. 2, 1993) [hereinafter Skipper Interview]. Rep. Skipper was the co-sponsor of HB 920. *Id.* Telephone Interview with Wade Ellis of the Atlanta Healthcare Alliance (Apr. 2, 1993) [hereinafter Ellis Interview]. The Atlanta Healthcare Alliance represents Georgia businesses in the health care matters. *Id.*; Council on Ethical and Judicial Affairs, American Medical Association, *Conflicts of Interest: Physician Ownership of Medical Facilities*, 267 JAMA 2366 (1992) [hereinafter AMA Council Report].

2. Skipper Interview, *supra* note 1.

3. A study commissioned by the Florida legislature indicates that previous estimates have understated the number of physicians participating in joint ventures providing health care services and the proportion of health care businesses either wholly or partially owned by referring physicians. Jean M. Mitchell and Elton Scott, *New Evidence of the Prevalence and Scope of Physician Joint Ventures*, 268 JAMA 80, 83 (1992). Approximately forty percent of Florida physicians involved in direct patient care have an investment interest in a health care facility to which they may refer

available for Georgia, the problem of overutilization of services under these self-referral arrangements is a legitimate concern.⁴ A report issued in 1992 by the American Medical Association (AMA) further recognized the potential conflict of interest and provided guidelines dealing with the problem.⁵

HB 920

HB 920 was proposed to eliminate this potential conflict of interest and to conform in principle to the AMA guidelines on patient self-referral.⁶ HB 212 and SB 236 were introduced in the 1993 legislative session dealing with patient self-referral. HB 212 was a disclosure bill and was viewed as insufficient to address the potential conflict of interest and abuse.⁷ Much of SB 236 was incorporated into the Act.⁸

Except as provided, HB 920 prohibits a health care provider from referring a patient for designated health care services to an entity in which he or she has an investment interest.⁹ This Act is not restricted to patients who are beneficiaries of state health plans, but extends to all patients.¹⁰

patients for services. *Id.* at 84. A study of the California workers' compensation system revealed increases in the cost of medical care when self-referral opportunities exist. Alex Swedlow et al., *Increased Costs and Rates of Use in the California Workers' Compensation System as a Result of Self-Referral by Physicians*, 327 *NEW ENG. J. MED.* 1502, 1504 (1992). These costs resulted from either an increase in the number of tests ordered by self-referral physicians, in the case of physical therapy or magnetic resonance imaging (MRI) scans, or from an increase in the actual cost per case by the self-referral physicians in the case of psychometric testing or psychiatric evaluation. *Id.*

4. Ellis Interview, *supra* note 1. The basic problem is the potential for physicians to view patients in financial terms with respect to referring them to a facility where the physician holds a financial interest. *Id.*

5. AMA Council Report, *supra* note 1; Skipper Interview, *supra* note 1.

6. Skipper Interview, *supra* note 1. Certain differences, some of which were reconciled in later versions of the bill, existed between the original version and the AMA guidelines. Telephone Interview with Cynthia Haney, Associate General Counsel for the Medical Association of Georgia (Apr. 2, 1993) [hereinafter Haney Interview]. These differences included the provisions for criminal penalties, present in the original bill but not available in the AMA guidelines, and the lack of provisions in the original bill allowing referrals when there is a demonstrated community need, such provision being present in the AMA guidelines. *Id.*

7. Skipper Interview, *supra* note 1.

8. *Id.*; see SB 236, as introduced, 1993 Ga. Gen. Assem.

9. O.C.G.A. § 43-1B-4(1) (Supp. 1993).

10. Skipper Interview, *supra* note 1; see O.C.G.A. § 43-1B-4(3) (Supp. 1993) (prohibiting any claims for payment made to an individual or third party payor for services pursuant to a referral prohibited under this Code).

The heart of the Act lies in the definitions section.¹¹ The original bill was restricted to physicians,¹² but was expanded to include chiropractors,¹³ and finally expanded to the term "health care provider," which includes physicians, chiropractors, podiatrists, optometrists, pharmacists, and physical therapists.¹⁴ This expansion of health care providers was intended to include those providers who have authority to refer patients.¹⁵ "Designated health services" is broadly defined to include clinical laboratory, physical therapy and rehabilitation, diagnostic imaging, pharmaceutical, and outpatient surgical services.¹⁶

"Investment interest" is an equity or debt security issued by the entity,¹⁷ but there are several notable exceptions to the definition. These investment interest exceptions include: providers of designated health service solely in rural areas,¹⁸ investment interests with interest rates that correspond to fair market value and that mature no later than July 1, 1996,¹⁹ investment interests in real estate that establish a landlord-tenant relationship between the provider and the equity interest entity as long as rent is not determined by business volume or profitability of the tenant or exceeds fair market value,²⁰ financial relationships between health sciences educational institutes and where faculty and employees are health care providers supplying health services,²¹ and investment interests in publicly held corporations with assets exceeding \$50 million, where specified additional criteria are satisfied.²²

11. Skipper Interview, *supra* note 1; see O.C.G.A. § 43-1B-3 (Supp. 1993).

12. HB 920, as introduced, 1993 Ga. Gen. Assem.

13. HB 920 (HCSFA), 1993 Ga. Gen. Assem.

14. O.C.G.A. § 43-1B-3(6) (Supp. 1993). This broadened definition was added in the Senate version. HB 920 (SCS), 1993 Ga. Gen. Assem. It is still not as broad as the definition of "health care provider" found in the original Senate bill, which included, among others, dietetic counselors, marriage therapists, physician's assistants and clinical social workers. SB 236, as introduced, 1993 Ga. Gen. Assem.

15. Skipper Interview, *supra* note 1.

16. O.C.G.A. § 43-1B-3(2) (Supp. 1993).

17. *Id.* § 43-1B-3(8) (Supp. 1993).

18. *Id.* § 43-1B-3(8)(A) (Supp. 1993).

19. *Id.* § 43-1B-3(8)(B) (Supp. 1993).

20. *Id.* § 43-1B-3(8)(C) (Supp. 1993).

21. *Id.* § 43-1B-3(8)(D) (Supp. 1993). This provision was absent in the initial versions and added in the House committee substitute at the request of Emory University, Mercer University, and the Medical College of Georgia to allow referrals by physicians within their respective systems. Skipper Interview, *supra* note 1; see HB 920 (HCS), 1993 Ga. Gen. Assem. This provision deals with health care providers within these university settings and does not refer to the hospitals themselves because hospitals are not included in the definition of health care providers. Skipper Interview, *supra* note 1.

22. O.C.G.A. § 43-1B-3(8)(E) (Supp. 1993). This provision was added in the Senate substitute. HB 920 (SCS), 1993 Ga. Gen. Assem. It allows investments in entities

The Act defines "referral" as sending a patient to another health care provider or entity that provides or supplies designated health care services.²³ There are multiple exceptions to this definition of referral,²⁴ the most notable being entities where the referring provider actually provides the medical services.²⁵ Distinctions have generally been drawn between referrals to entities where the referring provider renders no health care and those where the physician provides care.²⁶ This particular provision allows referrals to entities where the referring provider will provide services even though he or she has an investment interest in the entity.²⁷ An exception to what constitutes a referral also exists for emergency services.²⁸

This Act provides for civil penalties²⁹ as well as disciplinary action by the referring health care provider's Board, including the possibility of license revocation.³⁰ The criminal penalties found in the original bill were deleted from the later versions because the civil penalties and disciplinary measures available to the respective Boards were considered sufficient.³¹ Civil penalties, up to \$15,000 per violation, may be imposed when a person presents a bill or claim for service in violation of this Act and when a refund has not been issued for the amount collected in violation of this Act.³² Civil penalties of up to \$50,000 per violation may be imposed for entering a referral arrangement or scheme, such as a cross-referral arrangement, in order to circumvent the prohibitions on those referrals which would constitute a violation of this Code if made directly.³³ Lastly, there is a civil penalty of up to \$15,000 per violation for dividing fees between a health care provider and an entity where the health care provider is compensated solely for referring a patient.³⁴

sufficiently large for self-referral to not be a financial incentive for the referral of patients. Skipper Interview, *supra* note 1.

23. O.C.G.A. § 43-1B-3(10) (Supp. 1993).

24. *Id.* § 43-1B-3(10)(C) (Supp. 1993).

25. *Id.* § 43-1B-3(10)(C)(vi) (Supp. 1993). This provision was added in the House committee substitute. HB 920 (HCS), 1993 Ga. Gen. Assem.

26. SB 236, as introduced, 1993 Ga. Gen. Assem.; AMA Council Report, *supra* note 1.

27. Skipper Interview, *supra* note 1; Haney Interview, *supra* note 6.

28. O.C.G.A. § 43-1B-3(10)(C)(vii) (Supp. 1993). This provision was added in the Senate committee substitute. HB 920 (SCS), 1993 Ga. Gen. Assem.

29. O.C.G.A. § 43-1B-4(5)-(7) (Supp. 1993).

30. *Id.* § 43-1B-4(8) (Supp. 1993).

31. Skipper Interview, *supra* note 1; *see* SB 236, as introduced, 1993 Ga. Gen. Assem. The AMA guidelines, after which this Act was patterned, do not contain criminal sanctions. Haney Interview, *supra* note 6.

32. O.C.G.A. § 43-1B-4(5) (Supp. 1993).

33. *Id.* § 43-1B-4(6) (Supp. 1993).

34. *Id.* § 43-1B-4(7) (Supp. 1993).

A health care provider who acquired an investment interest prior to July 1, 1993 may continue to refer patients to that entity until July 1, 1996 as long as certain disclosure requirements are satisfied.³⁵ Among other requirements, the health care provider must inform the patient of the existence of the investment interest³⁶ and the patient's right to receive the service at a location or from a supplier of the patient's choice.³⁷ The disclosure must be in writing, approved by the health care provider's Board,³⁸ and must be publicly posted in the health care provider's office.³⁹

However, after July 1, 1996, unless expressly exempted, these disclosure provisions may not be interpreted as authorizing any referral otherwise prohibited.⁴⁰ After that date, health care providers may no longer refer patients to facilities in which the provider holds an investment interest.⁴¹ There is no requirement that the health care providers divest themselves of the investment interest, only that they no longer refer to that facility.⁴²

There are several exceptions to this Act, including referrals in areas with a demonstrated community need for designated health services,⁴³ treatment related to workers' compensation,⁴⁴ and where the health care provider and designated health service are restricted or regulated by federal law.⁴⁵

The section allowing referrals where there is a demonstrated community need was not included in the original bill.⁴⁶ The difficulties originally perceived in regulating and enforcing this provision were resolved by placing control under the State Health Planning Agency.⁴⁷ To satisfy the requirements of a demonstrated community need, the community must have no facility of reasonable quality, price, or service, and alternative financing must not be available.⁴⁸ Further, the entity may not require the health care provider to refer patients as a condition for becoming or remaining an investor, and other investors must be given a legitimate opportunity to invest on the same terms as the

35. *Id.* § 43-1B-5 (Supp. 1993); 1993 Ga. Laws 521, 530.

36. O.C.G.A. § 43-1B-5(a)(1) (Supp. 1993).

37. *Id.* § 43-1B-5(a)(3) (Supp. 1993).

38. *Id.* § 43-1B-5(a) (Supp. 1993).

39. *Id.* § 43-1B-5(b) (Supp. 1993).

40. *Id.* § 43-1B-5(c) (Supp. 1993).

41. Skipper Interview, *supra* note 1.

42. *Id.*

43. O.C.G.A. § 43-1B-6(a) (Supp. 1993).

44. *Id.* § 43-1B-7 (Supp. 1993).

45. *Id.* § 43-1B-8 (Supp. 1993).

46. Compare HB 920, as introduced, 1993 Ga. Gen. Assem. with O.C.G.A. §§ 43-1B-1 to -8 (Supp. 1993).

47. Skipper Interview, *supra* note 1.

48. O.C.G.A. § 43-1B-6(a) (Supp. 1993).

referring provider.⁴⁹ Income from the investment may not be based on the volume of referrals made nor shall the entity loan funds or guarantee loans for referring providers.⁵⁰ The provider must satisfy the general disclosure requirements.⁵¹ Lastly, the facility is required to provide a specific volume of uncompensated health services for indigent patients.⁵²

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49. *Id.* § 43-1B-6(a)(1) (Supp. 1993).

50. *Id.* § 43-1B-6(a)(2) (Supp. 1993).

51. *Id.* § 43-1B-6(a)(3) (Supp. 1993).

52. *Id.* § 43-1B-6(a)(4) (Supp. 1993).