

ARNSTEIN & LEHR LLP

Chicago, Illinois

120 South Riverside Plaza, Suite 1200
Chicago, IL 60606
phone 312.876.7100
fax 312.876.0288

Hoffman Estates, Illinois

2800 West Higgins Road, Suite 425
Hoffman Estates, IL 60169
phone 847.843.2900
fax 847.843.3355

Boca Raton, Florida

2424 North Federal Highway
Suite 462
Boca Raton, FL 33432
phone 561.322.6900
fax 561.322.6940

Fort Lauderdale, Florida

200 East Las Olas Boulevard
Suite 1700
Fort Lauderdale, FL 33301
phone 954.713.7600
fax 954.713.7700

Miami, Florida

200 South Biscayne Boulevard
Suite 3600
Miami, FL 33131
phone 305.374.3330
fax 305.374.4744

Tampa, Florida

Two Harbour Place
302 Knights Run Avenue, Suite 1100
Tampa, Florida 33602
phone 813.254.1400
fax 813.254.5324

West Palm Beach, Florida

515 North Flagler Drive, Suite 600
West Palm Beach, FL 33401
phone 561.833.9800
fax 561.655.5551

Milwaukee, Wisconsin

7161 North Port Washington Road
Milwaukee, WI 53217
phone 414.351.2440
fax 414.352.6901

www.arnstein.com

SUPREME COURT BROADENS FEE SPLITTING PROHIBITION

Every physician knows that fee splitting is illegal and unethical. What constitutes fee splitting may not be as well understood. Late last year, the Illinois Supreme Court established fairly clear rules as to what constitutes illegal fee splitting. The Court's ruling will have some surprising consequences. It may require physicians to change agreements with billing companies and others providing administrative services.

Traditionally, a physician was thought to engage in illegal fee splitting by dividing a patient fee with a recommending physician. The Supreme Court has substantially broadened that concept in the recently decided case of *Vine Street Clinic v Healthblink, Inc.* In that case, the Court ruled that it is illegal for physicians to share a percentage of their medical professional fees with anyone other than physicians with whom they practice (either in the same practice group or on a division of responsibility basis). This prohibition applies not only to payments to other physicians for a referral but also to percentage payments to anyone for any purpose, including payments for management and other services to the practice.

In the *Vine Street* case, a percentage payment was made to a company which had formed a provider network similar to an IPA and furnished claims processing services to physicians who contracted with it. The Court held that the percentage payment was void as against Illinois law and public policy, saying "Nonphysicians can receive a fee for -services rendered apart from a referral, but cannot receive a percentage of the physician's profit, or its equivalent." The ruling affects not only strict percentage arrangements but also any arrangement based directly or indirectly upon the amount of fees earned.

But at the same time, the Court endorsed paying for services based upon the level of effort expended so long as the payments were not linked to revenue, gross receipts or billings collected, either directly or indirectly. For instance, the Court found acceptable a payment mechanism related to the number of claims processed and which considered the physician's specialty, but did not rise or fall depending upon the amount of revenue collected. The Court noted that the number of claims processed would not necessarily increase or decrease proportional to the total earnings of the practice.

The Court's holding could have easily been interpreted as applying to fees generated by employees of a physician practice such as physical therapists and nurse practitioners but, fortunately, the Court explained that the prohibition does not apply to the division of fees with non-physicians for services performed by them because they cannot render medical professional services and the fee splitting prohibition applies only to fees for medical professional services.

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Thomas P. Conley
312.876.7809
Norman P. Jeddloh
312.876.6928

Accordingly, physicians may compensate non-physicians in their practice based upon a percentage of the fees generated by personally performed services but may not pay non-physicians a percentage of the physician's own fees. In practice, this means that physicians may pay a percentage of the fees billed in the name of the non-physician but not fees billed in the name of the physician such as 'incident to' fees.

Another important lesson *Vine Street* teaches is that payment for referrals - even payments of fixed amounts - is illegal, although it is still not entirely clear what constitutes a prohibited referral. In *Vine Street*, the Court held that a medical practice may pay to be included as part of a published network of thousands of physicians available for use by member-patients as it is the member-patient that makes the choice of physician, not the network. What continues to be prohibited is the referral of specific patients to specific physicians for a fee. The distinction is the passive listing of physician availability by a party not in a position to determine the need for medical care and the active referral of a patient to a particular physician or physicians by a treating physician.

The decision presents another immediate concern to many practices if they have entered into percent arrangement contracts. The Court held that, if an agreement contains a percentage payment provision, it is void and against public policy, meaning it is not enforceable in a court of law. In such event, neither party can enforce any of the terms of the agreement against the other. Instead courts are to leave the parties where they placed themselves if a legal dispute arises. For instance, if a party has provided services to a physician's practice for a percentage payment and is not paid, the party has no legal remedy to collect that payment. Also for instance, if a party is holding some of a physician's money pursuant to such an illegal contract, courts may not force the money to be turned over to the physician.

Physicians should carefully scrutinize their contractual arrangements to be sure that they do not contain percentage arrangements or similar prohibited payment provisions. Suspect arrangements include MSO agreements, marketing agreements, and management services contracts. In particular, *Vine Street* may affect collection agency contracts if set up on a percentage of collections basis. Further, it theoretically may affect contracts with banks and credit card companies if the credit card company charges a percentage of the amount collected. It bears repeating that if any of these arrangements violate the fee splitting prohibition, they are not enforceable and neither party will have any rights against the other, including for monies collected by the service provider but not turned over to the physician.

We will be happy to discuss any questions or concerns you may have about this development.

Prior issues may be found at www.arnstein.com

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