

HEALTH LAW HIGHLIGHTS

January 15, 2010

BAKER HOSTETTLER HEALTHCARE TEAM YEAR-END REVIEW: 2009

What a year 2009 was for the healthcare industry. From the crash of the financial markets, the enactment of HITECH and transformational changes to HIPAA, to the debate on healthcare reform, 2009 was a year of tremendous change and opportunity. The Baker Hostetler Healthcare Industry Team wanted to share a representative sampling of the unique and complex matters we handled for our clients in 2009, and we thank you for entrusting us with your legal matters. We are pleased to work with so many leaders in the healthcare industry.

In 2009, we debuted our webinar series, with conferences on ARRA (The American Recovery and Reinvestment Act) and HITECH, healthcare labor issues and healthcare reform. We received great feedback on these and plan to expand them in 2010. We were frequent speakers at healthcare conferences and contributed many articles to leading industry publications. This will continue and grow in 2010. And we were thought leaders on many topics; for example, team member Susan Feigin Harris worked with our colleagues and legislative contacts in Washington, D.C., in the debate on healthcare reform.

And while 2009 was a year of tremendous change and opportunity, it is likely just the tip of the iceberg. We look forward to working with you to navigate these changes and capitalize on opportunities.

Hospitals and Health Systems

From Community Hospital to Joint Venture Partner

Baker Hostetler served as counsel to a health system that, with a large physician organization, formed a joint venture that purchased the operations of a community hospital. In addition to the traditional deal work, we worked with state and federal regulators in their review and ultimate approval of the transaction.

New Specialty Hospital

Baker Hostetler worked with a health system and large orthopaedic physician group to open a new hospital specializing in the delivery of orthopaedic services. The transaction was not the purchase of an existing hospital. As such, we worked with the client on all related matters, including the corporate documentation, financing, state and federal regulatory issues, conversion of physician offices to hospital clinics and accreditations.

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At the Forefront of FICA Refund Litigation

Baker Hostetler's Healthcare team, in conjunction with our federal tax controversy team, continued to assist academic medical centers and teaching hospitals in their efforts to recover FICA taxes previously paid on stipends provided to medical residents. Nationwide, academic medical centers and the IRS have disputed for a number of years the extent to which FICA taxes must be paid on stipends provided to medical residents participating in graduate medical education (GME) programs. Many institutions have paid these taxes but filed protective refund claims while watching pending court cases. In response to a number of recent favorable court decisions, the Department of Justice has begun to enter settlement agreements with academic medical centers that have filed suit. In 2009, the Baker Hostetler Healthcare team continued its leading role in test cases and is in the process of settling existing cases and filing suit on behalf of additional teaching hospitals and academic medical centers interested in recovering FICA taxes paid with respect to periods ending before new regulations became effective in May 2005.

Ensuring Smooth License, Provider Agreement and Certification Transition

We assisted numerous health systems in reorganizations and transactions, which necessitated obtaining all new licenses, permits, and provider agreements with CMS and state Medicaid agencies. Our regular communication with CMS and other regulatory agencies helped make this a very smooth process for our clients.

Negotiation of Supply Chain Relationship

Baker Hostetler helped multiple hospitals and health systems in the design and negotiation of their supply chain arrangements, ranging from negotiations for major capital equipment purchases to comprehensive group purchasing arrangements.

Academic Medical Centers

We were regularly called upon to assist academic medical centers with various issues, including relationships between academic medical centers and community hospitals, GME reimbursement issues and other matters related to teaching programs, creating provider based clinics, examining medical staff issues, and reviewing and restructuring financial arrangements between the hospital and faculty practice plan.

Purchase and Sale of Ancillary Businesses

We represented several health systems in the purchase or disposition of various ancillary businesses, including dialysis and durable medical equipment. This included negotiating extended service agreements with extensive performance metrics.

Building Stronger Physician Relationships

We continued providing expertise to hospitals and health systems in their physician alignment strategies. This included developing and implementing various employment models, joint ventures and co-management arrangements. These efforts will continue under healthcare reform, as hospitals, physicians and ancillary providers develop aligned delivery models, such as accountable care organizations.

Counsel to Market Leaders

Providing Counsel to a Global Healthcare Leader

Baker Hostetler has long served as legal counsel to a *FORTUNE* 50 company specializing in healthcare-related supply chain services. During 2009, we assisted

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with the acquisition of a joint venture partner's 50 percent interest in a nuclear pharmacy, the multimillion-dollar sale of a specialty pharmacy and the development of a distribution agreement with the manufacturer of medical products, involving forward purchase of inventory.

Advising a Leader in the Dental Practice Management Sector

During 2009, Baker Hostetler continued its representation of a major national dental practice management service. We provided counsel on corporate governance matters, which included drafting shareholder agreements, share purchase agreements and preparation of documents related to share offerings. We also assisted with the purchase of the assets of a dental practice and with development of other transactional documents and filings. And as part of our comprehensive service for the client, we developed comprehensive reports regarding case law, regulatory issues and new legislation relevant to the operation of dental practice management companies around the country.

About Baker Hostetler's National Healthcare Team
Baker Hostetler is at the forefront of national law firms providing clients involved in every facet of healthcare delivery across the country with comprehensive legal counsel of remarkable responsiveness, creativity, quality and value. We understand the unique needs of the industry, and are dedicated to helping clients achieve their strategic and operational goals and resolve day-to-day operating issues through our experience, knowledge and national perspective. Supported by more than 600 attorneys and professionals in 10 cities coast to coast, our multi-disciplinary Healthcare Team offers clients nationwide strength across a diverse array of practice areas including Medicare and Medicaid reimbursement, regulatory compliance, fraud and abuse counseling, government investigations, subpoenas and audits, FDA, pharmaceuticals and biotechnology, tax and exempt organization laws, export controls, ERISA, management labor and employment, finance and business transactions, antitrust, lobbying, and commercial litigation, among others.

Charting a Course Through Rocky Financial Times

Baker Hostetler continued its representation of hospital systems, long-term care facilities, senior living facilities and other issuers of tax-exempt debt as they struggled through another roller coaster year. We assisted clients on a wide range of covenant compliance issues stemming in many cases from the loss of market value in investments and the impact of realized and unrealized investment losses on various financial covenants. We assisted these clients in negotiations with letter of credit banks and other credit and liquidity support providers, presentations to Bond Trustees and Rating Agencies and compliance with their ongoing disclosure requirements. We also represented clients on entering into new swaps, terminating existing swaps and collateral posting and other requirements, some of which are continuing fall out from the Lehman bankruptcy.

While the number of new tax-exempt issues was at historical lows, the Baker Hostetler Healthcare team successfully completed several financings, representing either the borrower or the underwriter in 9 completed transactions with a value of approximately \$475 million, including two of only a handful of new money issues in the senior living sector.

Providing Clarity on Regulatory Issues

Academic Medical Centers

Our Healthcare team is assisting a large academic medical center in establishing, and subsidizing in accordance with requirements of the Anti-Kickback and Stark Laws, an electronic medical records system for their medical staff. We also counseled a large academic medical center in self-disclosing to the OIG a technical violation of the Stark Law, settling the matter for a minimal amount.

Structuring and Restructuring Under Fraud and Abuse Laws

We assisted many providers in restructuring financial relationships to comply with provisions of the Stark law that went into effect October 1, 2008, including a large company that establishes cardiac catheterization facilities in negotiating a revision of certain arrangements with hospitals. One arrangement involved a gamma knife lease between a hospital and a partially physician-owned partnership and the other involved an agreement pursuant to which a partially physician-owned partnership managed a hospital's cardiac catheterization laboratory.

Who's Supervising?

The physician supervision rules for hospital outpatient departments took many twists and turns this year. We counseled numerous clients regarding the supervision requirements in hospital outpatient departments, and our team assisted two

large hospital clients in submitting comments to CMS proposed regulations relating to physician supervision requirements in hospital outpatient departments.

Raise Your Hand if You Have a Comment

We regularly monitor legislation for clients and as necessary submit comments directly for the client or through an association. For instance we submitted comments related to End Stage Renal Disease Prospective Payment System regulations on behalf of providers.

Agency Disputes

Fortunately, we have developed great relationships with many state and federal agencies. This close working relationship has been very beneficial for our clients so that they can address potential regulatory matters, and resolve disputes. For instance, we successfully represented several clients during licensure disputes with the state relating to state nursing qualifications and EMTALA complaints.

Compliance Programs, Investigations and Self-Disclosures

Focusing on Compliance and Government Investigations

Government investigations continue to be a focus area in the healthcare industry. This past year, we were again involved in many government investigations and reviews. For example, we represented a physician group in compliance and billing investigation by the Department of Justice. We also represented a physician in an investigation by the Office of Inspector of alleged Stark law violations. We also worked with numerous clients in responding to subpoenas from the Office of Inspector General and/or Department of Justice and defending the clients in the related allegations. We also represented a device company in a government investigation regarding relationships with physicians.

Guiding Clients on Internal Investigations, Self-Disclosures and Refunds

We represented numerous providers in conducting internal investigations of potential compliance issues. We assisted clients in analyzing the issues, assessing any payment impacts and making appropriate self-disclosure and refunds to fiscal intermediaries and carriers, the OIG and state Medicaid payors where appropriate. For example, we assisted a large hospital with a self-disclosure to the OIG regarding potential Stark violations. We also assisted a physician group with analyzing enrollment issues and making payment adjustments related to such issues. We also worked with clients on reviewing compliance with clinical trials and grants.

Payment Disputes: Governmental and Commercial

Handling Payment Disputes with Commercial Payors

During the past year, the Healthcare team represented various providers in payment disputes with commercial payors. Several of these cases have involved out-of-network payment rates as well as coverage issues. This area appears to be a focus for the commercial payors.

Managing Medicare Claims Appeals of Overpayment Demand

Our Healthcare team represented several providers in appeals of Medicare overpayments. For example, we represented a provider in a Medicare overpayment demand of approximately \$750,000. The allegations related to the medical necessity of the services and were initiated by the Program Safeguard Contractor. We pursued the case through the administrative appeals process and have reduced the amount to approximately \$50,000. We have also assisted and represented clients with demands made by Recovery Audit Contractors.

Medicare Cost Report Disputes

Our team received a favorable federal district court decision in a case of first impression involving application of the capital "hold harmless" payment methodology for certain new hospitals opening near the end of the capital PPS transition period. The case involves millions of dollars in capital payments that CMS sought to withhold from the hospital based on the agency's after-the-fact change in regulatory interpretation. The court held that the hospital is entitled to capital hold-harmless payment, even though it did not receive such treatment prior to the end of the ten-year capital PPS transition period.

In addition, our team was successful in obtaining a ruling from the D.C. district court that critical access hospitals that were "deemed rural" by statute have the same ability to claim CRNA pass through payments as those that are actually geographically located in a rural area. This case may allow for additional reimbursement for these specially situated critical facilities.

Bringing Clarity to Healthcare Reform Issues

Baker Hostetler continued its representation of providers before Congress concerning the healthcare reform legislation from the inception of the bills, focusing on provider reimbursement, Medicaid reimbursement, disproportionate share hospital cuts, ongoing viability of the Children's Health Insurance Program (CHIP), structure of COOP options in the bills and physician ownership ban grandfathering provisions. We worked to: represent clients and their interests by drafting summaries of provider positions for Congressional offices, establish and convene meetings with Congress, and provide draft legislative language for use by Congressional offices for amendments to the bills. Our team also worked to obtain funding appropriations for specific programming at hospital institutions.

Physician Representation

Continued Counsel for Physician Groups

Baker Hostetler's Healthcare team regularly counsels a number of physician and specialty groups. For our Midwestern clients in this sector, our 2009 activities included:

- Providing advice related to the regulatory issues involved in opening a histology laboratory.
- Negotiating a settlement agreement to resolve internal audit issues with a health system.
- Negotiating an amendment to the group's advisory services agreement to simplify the time-keeping process.
- Amending and restating an operating agreement to change associate eligibility requirements.
- Represented a large medical group in a dispute with its former billing company involving more than \$2 million.

Representing Clients in FDA Matters

In addition to our regular work in counseling drug, device, food and cosmetic clients regarding regulatory, corporate, intellectual property and litigation matters, we also have worked closely with the firm's government affairs practice in shepherding through FDA review several new products of a multinational consumer products manufacturer, as well as advocating on behalf of FDA regulated industries at the state and federal levels.

Tax

During the year, our team regularly advised tax-exempt healthcare clients on federal, state and local tax-exemption issues, including Form 1023 application issues, Form 990 disclosure issues and real estate tax-exemption issues.

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