CLIENT ALERTS & INSIGHTS

Aspen Dental Management Settles with N.Y. AG's Office To End Investigation Into Unauthorized Practice of Dentistry

JUNE 24, 2015

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On June 18, 2015, New York Attorney General ("AG") Eric T. Schneiderman announced a settlement with Aspen Dental Management, Inc. ("Aspen Dental") in which Aspen Dental agreed to pay $450,000 in civil penalties and reform its business and marketing practices to resolve allegations that it violated New York's corporate practice of medicine and dentistry doctrines ("Corporate Practice Doctrines") and fee-splitting laws.

The Aspen Dental settlement should serve as a reminder to healthcare companies that the Corporate Practice Doctrine is still actively enforced in New York and other states. Management and support services organizations should review their management and service agreements and ensure that their implementation is in line with the planned structure and the arrangements comply with the applicable Corporate Practice Doctrines and fee splitting laws of the states in which they operate.

Summary of N.Y. Corporate Practice Doctrines And Fee-Splitting Prohibition

New York's Corporate Practice Doctrine prevents corporations from practicing medicine or dentistry. While not directly set forth in statute, New York's Corporate Practice Doctrine finds its source in the New York Education Law, which makes clear that only natural persons may be licensed to practice medicine, dentistry or dental hygiene. N.Y. Educ. Law §§ 6522, 6602, 6607. Shareholders of professional service corporations must be physicians or dentists who are also licensed to practice within the state. *See* N.Y. Bus. Corp. Law §§ 1501, 1503(a), 1507. Significantly, violating the prohibition on the corporate practice of medicine or dentistry is a felony. N.Y. Educ. Law § 6512.

Under New York law, licensed professionals or professional firms are also prohibited from splitting or sharing their fees with individuals or entities not licensed to provide health care services. N.Y. Educ. Law § 6509-a. Essentially, a provider cannot split a fee with a non-physician/dentist. This prohibition extends to business corporations and individuals who do not possess a license to provide the relevant health care services. The accompanying regulation expressly prohibits compensation arrangements involving fees paid as a percentage of, or even dependent upon revenue earned by healthcare professionals. 8 NYCRR 29.1(b)(4). There is also a corporate parallel in New York regulations on the prohibition of fee splitting between medical facilities (including Article 28 and 36 facilities) and individuals or entities which have not been approved as a health care establishment by the Department of Health. 10 NYCRR 600.9(c). The purpose of the prohibition is to limit control by an unregulated and unaccountable entity over a licensed provider and to protect the financial viability of the licensed provider.

A number of New York Department of Health Advisory Opinions further detail and clarify these prohibitions. Accordingly, unlike the practice in some states, management and support service organizations in New York may not manage a physician or dentist's practice in return for a percentage of patient revenues given New York's fee-splitting rules.

AG's Investigation of Aspen Dental

The AG's Office reported that it began its investigation in 2013 after having received more than 300 consumer complaints over the past 10 years regarding Aspen Dental's quality of care, billing practices, misleading advertising, upselling of unnecessary dental services and products and dental care financing.

The AG's office claimed that rather than provide arms-length, back-end business and administrative support to independent dental practices, Aspen Dental developed a chain of dental practices technically owned by the individual dentists, but subject to extensive control by Aspen Dental in violation of New York's Corporate Practice Doctrine.

Aspen Dental's extensive control was allegedly demonstrated by Aspen Dental sharing in the individual clinic profits and marketing by Aspen Dental under Aspen Dental's trade name. Furthermore, the AG alleged that through an array of business practices, Aspen Dental routinely made decisions that impacted clinical care and dictated the dental practices' care of patients, including incentivizing sales of services and products, implementation of revenue-oriented patient scheduling systems, hiring and oversight of clinical staff. Aspen Dental is also accused of barring its individual locations in a region from competing against each other for patients.

The AG also alleged that Aspen Dental exercised undue control over the dental practices' finances by utilizing a single consolidated bank account for all of the dental practices and to which the dental practice owners did not have access. Additionally, the AG noted that New York fee splitting laws prohibit a health care management company to be compensated based on the profits of the clinics its manages. The New York AG's office specifically claimed that Aspen Dental took a pre-set percentage of each dental office's monthly gross profit.

Notably, the settlement agreement between Aspen Dental and New York state indicates that Aspen Dental and the dental practices had contracts in place that set forth an annual flat fee for the management services, in addition to payments for expenses. However, the dental practices' financial statements purportedly reflect that Aspen Dental was not paid a flat fee for its services. Rather, Aspen Dental received an agreed-upon percentage of each office's gross profits on a monthly basis, which typically was 45% or 50% of an office's gross profits.

Aspen Dental Management's Response to AG's Press Release

In response to the AG office's press release concerning the settlement, Aspen Dental defended its business practices and accused the AG's office of mischaracterizing the nature of the settlement agreement. Aspen Dental claimed that it has never made decisions about clinical care for the 1.2 Million patients seen at the independent practices in New York state over the past ten years. Furthermore, Aspen Dental characterized the AG's statement that the dentists only "technically" owned the dental practices as a gross misstatement of fact as the owners are in their office every day, "treating patients and exercising complete control over all clinical decisions." Finally, Aspen Dental explained that it has never employed clinical staff nor exercised any control over clinical care.

Settlement Agreement with Aspen Dental Management

When entering into the settlement agreement, Aspen Dental neither admitted nor denied the AG's findings, but agreed to make certain changes to its business and marketing practices with respect to the dental practices located in New York to which Aspen Dental provides its administrative and support services, including:

- not control the dental practices' clinical decision-making;
- not communicate directly with clinical staff concerning how to provide care or sell services or products, or the amount of revenue generated by services or products;
- not employ the practices' clinical staff;
- not split fees with the practices for professional services rendered;
- keep the practices' finances separate from its own;
- allow the practice to have full and complete control over revenues, profits, incomes, disbursements, bank accounts and other financial matters and decisions;
- make clear on its website for consumers that Aspen Dental only provides administrative and business support services to independently owned and operated dental practices; and
- ensure that the applicable dental practices post their own legal name so it is easily visible to patients who enter those practices.

Finally, Aspen Dental also agreed to pay a $450,000 civil penalty and to also pay an independent monitor that will oversee the implementation of the settlement over a three-year period. It is important to note that the settlement agreement only pertains to Aspen Dental's operations in New York.

Lessons Learned

The Aspen Dental settlement should serve as a reminder to management and support service organizations to be wary of the continued focus on practice management structures and the heightened enforcement of fraud and abuse in the industry. Management and support services organizations should review their agreements for compliance with applicable Corporate Practice Doctrines and other state laws, and to ensure that their day-to-day operations are in line with the planned structure set forth in the agreements.

For more information on management company arrangements, support service agreements, fraud and abuse enforcement or related issues, please feel free to contact Frank Carsonie, Alan Schabes, Cliff Mull, Daniel Meier or any other member of our health care practice group for a further discussion.