



Strasburger
ATTORNEYS AT LAW

Health Industry Online

HEALTH INDUSTRY ONLINE • August 29, 2007 • STRASBURGER & PRICE, LLP

PREPARED BY



Stuart F. Miller

1401 McKinney Street,
Suite 2200
Houston, Texas 77010.4035
713.951.5636 Direct
stuart.miller@
strasburger.com

EDITORS

Kathy Darling
Brian G. Hamilton
Laura Reilly O'Hara

HEALTH INDUSTRY GROUP

Tejal P. Banker
Debra W. Biehle
Thomas W. Burton
Merritt M. Clements
Kathryn Midboe Darling
William Duane Darling
Richard D. Fladung
R. Bradley Fletcher
Brian G. Hamilton
John R. Lowry
Bryan J. Maedgen
Cynthia Schafer Marietta

Failure to Fully Comply with LLP Registration Requirements May Open Partners to Unlimited Liability




Before the recent change in Texas law making the margin tax applicable to all partnerships, many health care companies opted to be formed as limited liability partnerships. Texas limited liability partnerships have historically offered certain benefits: they were not subject to the Texas franchise tax, they are not required to have a general partner with unlimited liability, and the management rules that apply to them are more flexible than those of a limited partnership. The new margin tax, along with a recent San Antonio Court of Appeals case will discourage the future use of limited liability partnerships.

In *Edward B. Elmer, M.D., P.A. v. Santa Fe Properties, Inc.*, No. 04-05-00821-CV, 2006 WL 3612359 (Tex.App.-San Antonio, no pet.), the San Antonio Appeals Court held that a partner in a Texas limited liability partnership was not shielded against liability for breaching a commercial lease because the limited liability partnership had failed to comply with the statutory registration requirements at the time it incurred its lease obligations.

In order to protect partners from individual liability, registered limited liability partnerships (LLP's) must comply with those registration requirements set forth in Article 6132b-3.08 of the Texas Revised Partnership Act ("TRPA"). Article 6132b-3.08(a) provides in order to qualify as a properly registered limited liability partnership, and thereby protect its partners from liability for partnership debts and obligations, the limited liability partnership must either:

- (i) carry at least \$100,000 of liability insurance of a kind that is designed to cover the kinds of errors, omissions, negligence, incompetence or malfeasance for which liability is limited by the Texas Revised Partnership Act; or

[Stuart Miller](#)
[David G. Moore](#)
[Crawford Moorefield](#)
[Craig H. Myers](#)
[C. Scott Nichols](#)
[Laura Reilly O'Hara](#)
[Jeffrey S. Osgood](#)
[David L. Ovard](#)
[D. Patrick Owens](#)
[Cathy Schnaubelt](#)
[Paul W. Sheldon](#)
[John A. Tang](#)
[Joseph A. Turano](#)
[Melissa Webb](#)
[Carol D. Williamson](#)
[Ivan Wood](#)
[Kevin M. Wood](#)

 [Printer friendly page](#)
 [View as Acrobat PDF](#)
 [Subscribe to HIO RSS](#)

(ii) provide \$100,000 of funds specifically designated and segregated for the satisfaction of judgments against the partnership based on the kinds of errors, omissions, negligence, incompetence or malfeasance for which liability is limited by Subsection (a)(2) by:

- (a) deposit in trust or in bank escrow of cash, bank certificates of deposit or United States Treasury obligations; or
- (b) a bank letter of credit or insurance company bond.

In *Elmer*, the Court noted that, unlike the limited partnership statute, the LLP provisions contain no substantial compliance language. Therefore, the Court concluded that strict compliance with the statute is required. Although *Elmer*, a partner in the limited liability partnership, carried errors and omissions insurance, the policy only covered *Elmer* individually and did not cover the partnership or the other partner. As such, the Court found, the partnership did not have the requisite insurance or other forms of financial responsibility designated by the statute, and was, therefore, not a properly registered limited liability partnership. Accordingly, the Court held that the partner was not protected from liability.

The *Elmer* ruling is noteworthy because it emphasizes the need for limited liability partnerships to strictly comply with the registration requirements of TRPA Article 6132b-3.08 (b). Our experience has shown that it can be difficult to obtain the type of insurance referenced in the statute. We, therefore, advise all limited liability partnerships to confirm with their insurer that they have the type of errors and omissions insurance that satisfies the statute. Alternatively, we suggest that they seek a letter of credit from their banker in order to comply with the statute's second option. Finally, we believe that the possibility of having no liability protection, coupled with the loss of any tax advantages, makes the limited liability partnership a less desirable choice for newly-formed entities. On a going forward basis, we would suggest that these entities form as a limited liability company, rather than a limited liability partnership. It may even be advisable for some current limited liability partnerships to consider converting to a limited liability company in order to ensure proper protection against individual liability. However, selection of an organizational structure should be made on a case-by-case basis with the advice of counsel.

ALERT – CMS Issues Phase III Final Rule for Stark Law

ALERT BY



Kevin M. Wood

600 Congress Avenue,
Suite 1600
Austin, Texas 78701.2974
512.499.3664 Direct
kevin.wood@
strasburger.com

On August 27, 2007, the Centers for Medicare and Medicaid Services (CMS) issued the Phase III final rule for the federal physician self-referral prohibition, commonly known as the Stark Law. In general, the Stark Law prohibits physicians from referring patients for certain Medicare-covered designated health services (DHS) to entities with which the physicians (or immediate family members) have a financial relationship. Financial relationships may exist through direct or indirect compensation arrangements or ownership arrangements. Otherwise prohibited referrals can only be made if all the requirements of an applicable Stark Law exception are met.

The Phase III rule finalizes, and responds to public comments regarding, the Phase II interim final rule that was published in March 2004. In developing and issuing the Phase III rule, CMS has attempted “to preserve the core statutory prohibition, while providing sufficient flexibility to minimize the impact of the rule on many common business arrangements.” CMS has also attempted to simplify the rule, to provide additional guidance and to reduce any undue burden on those impacted by the Stark Law and its regulations.

Some of the items included in the Phase III rule are:

- Removal of the use of compensation surveys (as adopted in Phase II) to ensure safe harbor protection for “fair market value” compensation and renewed emphasis by CMS on the need for documentary support to support fair market value determinations;
- Clarification that an independent contractor physician will only qualify as a “physician in the group practice” under a **direct** contractual arrangement between the contracting physician and the group practice;
- Addition of a “stand in the shoes” provision under which referring physicians will be treated as “standing in the shoes” of their group practices when the group practices have direct arrangements with DHS entities, thereby viewing the physicians as having direct financial relationships instead of indirect relationships through their group practices;
- Modification of the physician recruitment restrictions;
- Provision of more flexibility in complying with non-monetary compensation limits; and
- Clarification of CMS’ interpretation of existing Stark Law regulations.

The Phase III rule is currently on display at the Office of the Federal Register. The display version of the rule can be accessed online at:

www.cms.hhs.gov/PhysicianSelfReferral/Downloads/CMS-1810-F.pdf.

The Phase III rule is expected to be published in the September 5, 2007, edition of the *Federal Register*. We will continue to analyze the impact of the Phase III rule on existing arrangements and provide updated information as it is available.

PUBLICATIONS:

- To view past issues of Health Industry Online, please visit [Health Industry Online](#)
- To subscribe to other Strasburger publications, please visit [Strasburger Publications](#)

DISCLAIMER: Articles contained within this newsletter provide information on general legal issues and are not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

ADVERTISEMENT NOTICE: This e-mail may constitute a commercial electronic mail message subject to the CAN-SPAM Act of 2003. If you do not wish to receive further commercial electronic mail messages from the sender, please send an e-mail to Strasburger@Strasburger.com and request that your e-mail address be removed from future mailings. To update your address, please send an email to Strasburger@Strasburger.com including the updated information. Strasburger & Price, LLP, 901 Main Street, Suite 4400, Dallas, TX 75202.

