1) FALSE CLAIMS/FRAUD & ABUSE

Overview of Authority
The Tennessee Attorney General (Attorney General) has authority to bring a civil action for a violation of the Tennessee Medicaid False Claims Act (TMFCA). Under the TMFCA, anyone who knowingly presents or causes the presentation of a false claim to the state Medicaid program (in Tennessee, Medicaid is administered under the program TennCare) is liable for damages of up to three times the damages sustained by the state, plus civil penalties of $5,000 to $25,000 per false claim. Any person may bring a civil action for a violation of the TMFCA in the name of the state (a qui tam plaintiff). Such action may be dismissed only if the court and the Attorney General (or District Attorney General) gives written consent to the dismissal. In addition, upon written request of the Attorney General, the Bureau of TennCare may bring an administrative action on behalf of the state against a TennCare provider for a violation of the TMFCA.

Pursuant to the TennCare Fraud and Abuse Reform Act of 2004, the Tennessee Office of Inspector General (OIG) has the authority to investigate civil and criminal fraud and abuse of the TennCare program, as well as to refer matters to the Medicaid Fraud Control Unit (MFCU) for Tennessee. OIG may also refer matters to the appropriate enforcement authority for criminal prosecution or civil investigation. The MFCU, a division of the Tennessee Bureau of Investigation, is authorized to refer for prosecution actions for TennCare provider fraud and abuse. In addition to facing criminal penalties, a person who is guilty of TennCare fraud is subject to civil monetary penalties, disciplinary action from the applicable state professional board, and disqualification from participation in the TennCare program. Tennessee has also adopted other false claims statutes to prevent fraud and abuse, namely the Tennessee False Claims Act (TFCA) that specifically carves out Medicaid.
**Tennessee Medicaid False Claims Act—Tenn. Code Ann. § 71-5-181, et seq.**

The TMFCA is located at TENN. CODE ANN. §§ 71-5-181-185 and mirrors in material respects the provisions in the federal False Claims Act (Federal FCA).

Under the TMFCA, it is a false claim to: (1) knowingly present or cause to be presented a false claim or fraudulent claim for payment or approval under the Medicaid program; (2) knowingly make, use, or cause to be made or used a false record or statement material to a false or fraudulent claim under the Medicaid program; (3) conspire to violate the TMFCA; or (4) knowingly make, use, or cause to be made or used a false record or statement material to an obligation to pay money or property to the state, or knowingly conceal, or knowingly and improperly avoid, or decrease an obligation to pay money or property to the state relative to the Medicaid program. TENN. CODE ANN. § 71-5-182(a)(1)(A)-(D).

The TMFCA defines “knowledge” as “actual knowledge of the information,” “deliberate ignorance of the truth or falsity of the information,” or “reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.” TENN. CODE ANN. § 71-5-182(b).

The TMFCA defines “obligation” as “an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.” TENN. CODE ANN. § 71-5-182(d). The TMFCA does not contain a provision similar to the provision at Section 6402(a) of the Patient Protection and Affordable Care Act (PPACA),¹ which interprets “obligation” under the Federal FCA at 31 § U.S.C. 3729(b)(3) as requiring the report and refund of an overpayment 60 days after the overpayment is identified. Despite not containing a similar provision, the Bureau of TennCare issued a policy memorandum on October 22, 2012, stating that the 60-day report and refund rule applies to TennCare providers. PI 11-001 (Rev. 3) (Oct. 22, 2012).²

The TMFCA defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” Tenn. Code Ann. § 71-5-182(e).

**Damages Provisions**

Violation of the TMFCA results in liability “to the state for a civil penalty of not less than five thousand dollars ($5,000) and not more than twenty-five thousand dollars ($25,000), plus three (3) times the amount of damages which the state sustains because of the act of that person.” TENN. CODE ANN. § 71-5-182(a). The liability extends to the costs of the civil action brought to recover the damages. TENN. CODE ANN. § 71-5-182(a)(3). Where a court finds that the violator: (1) provided the

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² Available at [www.tn.gov/tenncare/forms/pi11001.pdf](http://www.tn.gov/tenncare/forms/pi11001.pdf).
investigator with all information known to the violator within 30 days of obtaining the information; (2) fully cooperated in the investigation; (3) at the time it provided the information, no prosecution, civil action, or administrative action had yet commenced; and (4) did not have actual knowledge of the existence of an investigation into the violation, the court may assess two times the amount of damages instead of three. TENN. CODE ANN. § 715-182(a)(2).

**Qui Tam—Whistleblower Provisions**

Under TENN. CODE ANN. § 71-5-183(b)(1), a person can bring a civil action for violation of the TMFCA “for the person and for the state.”

Where the state intervenes in the action, the qui tam plaintiff may recover between 15% and 25% of the proceeds. TENN. CODE ANN. § 71-5-183(d)(1)(A). Where intervention is declined, the relator may recover between 25-30%. TENN. CODE ANN. § 71-5-183(d)(2).

The qui tam must be filed in camera and remain under seal for at least sixty days while the State investigates the allegations and determines whether to intervene in the case. Tenn. Code Ann. § 71-5-183(b)(2). The State for good cause shown may obtain extensions to the seal period. Id. In addition to filing the complaint, the relator also must serve the State with written disclosure of “substantially all material evidence and information the person possesses.” Id.

**Public Disclosure Bar**

The TMFCA public disclosure bar is found at TENN. CODE ANN. § 71-5-183(e)(2)(A). Under this provision, the court shall dismiss unless opposed by the state any lawsuit where the allegations are substantially the same as information publicly disclosed in a criminal, civil, administrative hearing (in which the state or its agent is a party), audit, investigation, or in the news media—unless the relator is an original source of the information. April 2012 amendments to the statute altered this section to bring it in line with the current Federal FCA. After April 2012, a qui tam action is barred by the public disclosure bar where the allegations are “substantially the same” as the public disclosure. Under the prior version, actions were barred where the allegations were “based upon” the public disclosure. The amendments also altered the jurisdictional bar to allow the state to oppose dismissal even where the court finds the action is barred.

A qui tam relator is an original source under the TMFCA where: (1) prior to a public disclosure he voluntarily disclosed to the state “the information on which allegations or transactions in a claim are based”; or (2) he has knowledge that is “independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state before filing an action.” The April 2012 amendments changed the original source knowledge standard from “direct and independent knowledge of the information” to “independent of and materially adds.” TENN. CODE ANN. § 71-5-183(e)(2)(A)-(B). In contrast, the statute still bars actions that are “based upon” allegations or transactions that are
the subject of a civil suit or an administrative civil monetary penalty proceeding in which the state is already a party, providing that in no event may a person bring an action under such circumstances. TENN. CODE ANN. § 71-5-183(e)(1).

**Statute of Limitations**
The TMFCA statute of limitations is identical to the Federal FCA, and provides that an action may not be brought more than six years after the violation, or no more than three years from the date the material facts were known or should have been known by the official charged to act, and in no event, more than ten years from the date of the violation. TENN. CODE ANN. § 71-5-184(b). The April 2012 amendments added that in a qui tam action, the state’s complaint in intervention relates back to the filing of the relator’s complaint.

**Retaliation**
The retaliation provision of the TMFCA is found at TENN. CODE ANN. § 71-5-183(g). Tennessee’s legislature amended this provision in April 2013 to bring it in line with the analogous Federal FCA retaliation provision. The provision prohibits the discharge, demotion, suspension, threat, harassment, or any other discrimination against an employee, contractor, agent, or associated others for bringing an action under the TMFCA, or otherwise acting in “furtherance of an action” or “other efforts to stop” conduct prohibited by the TMFCA. Relief for violation of this provision includes “reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two (2) times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.” TENN. CODE ANN. § 71-5-183(g). The provision imposes a statute of limitations for bringing a retaliation action of three years after the date on which the retaliation occurred.

**Other Relevant Sections**
TENN. CODE ANN. § 71-5-184(a) allows for nationwide service of subpoenas for attendance of witnesses at trial or hearings. This provision does not appear to extend to the production of documents.

The State alleged that defendant pain practices, companies that managed the pain practices, and individuals who owned or ran the management companies violated the TMFCA by billing TennCare MCOs for unnecessary and improperly-coded injection procedures. Defendants moved to dismiss on multiple grounds, all of which were denied.

Of note, the defendants argued that the lawsuit should be dismissed because the State lacked standing and had incurred no damages because under managed Medicaid, the State paid capitated amounts to MCOs that did not vary based on the claims submitted to the MCOs in this case. The Court held that the TMFCA
expressly applied to the TennCare managed care system which provided standing to
the State. Even though the court held that the TMFCA did not require the State to
plead damages to state a claim, the court noted that the State had plead that the
alleged fraud would have impacted capitation rates and the costs of the
investigation.

The court also held that the State had stated claims under the TMFCA against not
only the clinics that submitted claims but also against the management companies
and individual defendants for causing the claims submitted by the clinics to have
been false.

**Tennessee False Claims Act—TENN. CODE ANN. § 4-18-101 et seg.**

Under the TFCA at TENN. CODE ANN. § 4-18-103(a)(1)-(9), it is a violation of state
law for any person to knowingly present to the state of Tennessee or political
subdivision a false claim for payment or approval or who knowingly makes or causes
to be made a false record in order to get a false claim paid by the state of
Tennessee. Additional relevant provisions include conspiracy to defraud (TENN.
CODE ANN. § 4-18-103(a)(3)), possession of public property, or money used or to
be used by the state where an individual knowingly delivers or causes to be
delivered less property than the amount used or to be used by the state (TENN.
CODE ANN. § 4-18-103(a)(4)), knowingly makes or causes to be made false records
or statements to decrease or conceal an obligation (TENN. CODE ANN. § 4-18-103 (a)(7)), and knowingly makes, uses, or causes to be made false or fraudulent
conduct, representation, or practice in order to procure anything of value directly or
indirectly from the state (TENN. CODE ANN. § 4-18-103(a)(9)).

It is also a violation of the TFCA for a person to make an inadvertent submission of a
false claim and, later, fail to disclose or report the inadvertent submission after
discovering the error.

The TFCA does not apply to “any conduct, activity, or claims covered by the
Medicaid False Claims Act” at TENN. CODE ANN. § 71-5-181 through -185.
Although the TFCA excludes Medicaid fraud from its scope, case law interpreting the
TFCA is relevant to how courts may interpret provisions under the TMFCA. Likewise,
the TFCA is a tool that may be used in addition to the TMFCA against health care
providers in contexts involving state grants, state tax incentives, and other state
programs such as those involving prisons and Department of Children’s Services,
among other programs.

**Damages Provisions**

A violation of the TFCA results in liability for the costs of the civil action brought to
recover the damages, and civil penalties of not less than $2,500 and not more than
$10,000 for each false claim, plus three times the amount of damages sustained by
the state or political subdivision. TENN. CODE ANN. § 4-18-103(a). The court may
order two times the amount of damages where the individual cooperated with the
investigators, provided the information within 30 days of receipt, and an action had not yet been filed. TENN. CODE ANN. § 4-18-103(b)(1)-(3).

**Qui Tam—Whistleblower Provisions**
The whistleblower provision of the TFCA is found at TENN. CODE ANN. § 4-18-104(c)(1). That section provides that a person may bring a civil action for a violation of this chapter for the person and for the state of Tennessee in the name of the state (or a political subdivision), if any state funds are involved. The complaint is filed in circuit or chancery court under seal.

**Tennessee Public Disclosure Bar**
TENN. CODE ANN. § 4-18-104(d)(3)(A) provides Tennessee’s public disclosure bar. Under the bar, “No court shall have jurisdiction over an action under this chapter based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the general assembly, comptroller of the treasury, or governing body of a political subdivision, or by the news media, unless the action is brought by the attorney general and reporter or the prosecuting authority of a political subdivision or the person bringing the action is an original source of the information.” Tennessee defines “original source” as “an individual, who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure.” TENN. CODE ANN. § 4-18-104(d)(3)(B). Tennessee bars actions brought by state employees unless they first exhaust internal reporting procedures. TENN. CODE ANN. § 4-18-104(d)(4).

**Statute of Limitations**
The statute of limitations provides that an action may not be initiated three years after the discovery by the official charged to act, or more than ten years from the time of the violation. TENN. CODE ANN. § 4-18-106.

**Retaliation**
The TFCA anti-retaliation provision is found at TENN. CODE ANN. § 4-18-105. The section provides that “no employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under § 4-18-104.” Relief under this provision includes “all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two (2) times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate,
punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys’ fees.” An employee cannot obtain relief if they were involved in the conduct giving rise to the violation, unless: (1) the employee voluntarily provided information to the government; and (2) the employee was coerced into engaging in the fraudulent conduct by the employer. The retaliation provision does not include a separate statute of limitations.

**Case Law—Knox County ex rel. Envtl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511 (Tenn. 2011)**
Environmental Termite & Pest Control Inc. (Environmental) brought a qui tam action against two termite control companies that provided services to the Knox County school district in which the relator alleged that the defendant companies fraudulently overbilled the county for the services provided. The county intervened in the lawsuit and ultimately a settlement was reached. The trial court then found that Environmental was entitled to a portion of the proceeds of the settlement under TENN. CODE ANN. § 4-18-104(g)(2) for its role in uncovering the overbilling and bringing the qui tam action. The Tennessee Court of Appeals affirmed the trial court’s conclusion that Environmental was entitled to recover a portion of the value of the settlement proceeds, but remanded the case for the purpose of re-determining the value of the settlement. *Knox County ex rel. Envtl. Termite & Pest Control, Inc.*, No. E2007-02827-COA-R3-CV, (Tenn. Ct. App. July 20, 2009).

Knox County then filed an appeal to the Tennessee Supreme Court on the sole issue of whether Environmental is eligible to receive a portion of the settlement proceeds. At the Tennessee Supreme Court, Knox County argued that Environmental was not an “original source” under the TFCA and thus was not entitled to receive a portion of the settlement proceeds. The state Supreme Court rejected this argument and found that Environmental qualified as an original source as a result of the lengthy independent investigation Environmental conducted that uncovered the overbillings. Furthermore, the court noted that Environmental presented the findings of its investigation to numerous county officials on multiple occasions before filing its qui tam lawsuit. Accordingly, the court held that Environmental was an original source and was thus entitled to a portion of the proceeds of the settlement.

Dr. Landenberger, a former employee of Defendant Project Return Inc. (Project Return), brought a qui tam action against Project Return and alleged that Project Return submitted invoices to the state that certified compliance with its contract when Project Return knew that it had not performed its duties under the contract. Project Return submitted to the relator an offer of judgment that the relator accepted. A few days following acceptance, however, Project Return moved to strike the offer of judgment under Rule 60 of the Tennessee Rules of Civil Procedure, and the court ultimately granted the motion to strike the offer of judgment. The relator then failed to appear for numerous depositions, and the relator’s attorney advised the court that
the relator had left the country. Project Return moved to dismiss the case as a result of the relator's absence and the court granted such motion and dismissed the case.

Although the appeal largely focused on the propriety of the court's granting of the Rule 60 motion, the court also addressed certain issues regarding the TFCA. On appeal, Project Return, among other things, contended that the relator was not an original source of the alleged violations and thus argued the case should be dismissed on this ground. The court rejected this argument and explained that the original source provision of the TFCA only applies where there has been a public disclosure of the alleged violations. The court then concluded that since there had not been a public disclosure in this matter, the original source provision was inapplicable.

The court, however, affirmed the dismissal of the lawsuit as a result of the relator's absence or withdrawal from the case and held that a qui tam plaintiff’s attorney may not proceed with a suit under the TFCA in the absence of the qui tam plaintiff.

**Tennessee Civil Investigative Demands—TENN. CODE ANN. § 8-6-401, et seq.**

Tennessee's civil investigative demand (CID) authority is found at TENN. CODE ANN. §§ 8-6-401-408. The statute empowers the Attorney General and reporter in any action in which the state is, or may be, a party, “to require any person to testify under oath as to any matter which is a proper subject of inquiry by the” Attorney General and reporter. TENN. CODE ANN. § 8-6-401. The Attorney General or reporter, or a designee, is authorized to administer oaths.

The CID may require attendance of witnesses, and/or submission of documents, at specified times and places. TENN. CODE ANN. § 8-6-402(a). The demand must state the parties to the inquiry. A witness may not be required to testify in any county other than the county of their residence or where the documents are found. TENN. CODE ANN. §§ 86-402(b), 8-6-403. Actions to compel compliance with the CID must be brought in the chancery court of the judicial district in which the witness resides. TENN. CODE ANN. § 86-404.

**Case Law—State ex rel. Shriver v. Leech, 612 S.W.2d 454, 456 (Tenn. 1981)**

The Tennessee Supreme Court has held that a CID must “identify the parties to the ‘case’ or ‘investigation,’" and state the case that is pending “or the ‘matter’ under investigation.” State ex rel. Shriver v. Leech, 612 S.W.2d 454, 456 (Tenn. 1981). The court also held that only the Attorney General himself, or the reporter, has authority under the statute to issued CIDs. Id. at 456. His deputies and assistants do not have that authority, though they have the authority to administer oaths pursuant to the statute. Id.

There is a recognized due process right to refuse unreasonable and irrelevant investigative demands. Id. at 456. If the party finds the demands of the CID unreasonable, the party who issued the CID can wait until the state moves to compel compliance and can then raise the unreasonableness of the CID as a
defense to the action to enforce compliance. *Leech*, 612 S.W.2d 459. The court has the right to compel testimony.

2) ANTI-KICKBACK/FEE SPLITTING

Tennessee has several anti-kickback and fee-splitting provisions, each of which is discussed individually below. The Tennessee anti-kickback and fee-splitting provisions are designed generally to prohibit inducements or improper remuneration for the referral of patients (including inducements offered to the patients themselves). As a general matter, these provisions are broadly worded and, except where noted, have not been the subject of interpretation by Tennessee courts or by the Attorney General.

**ANTI-KICKBACK PROVISIONS**

**TennCare Anti-Kickback and Anti-Solicitation Prohibitions**

TennCare providers are prohibited from offering or receiving “remuneration in any form related to the volume or value of referrals made or received from or to another provider.” **TENN. COMP. R. & REGS. §§ 1200-13-13-.08(4)(d) and 1200-13-14-.08(4)(d).** Both TennCare Medicaid and TennCare Standard rules also prohibit “managed care contractors and providers from soliciting TennCare enrollees by any method offering as enticements other goods or services (free or otherwise) for the opportunity of providing the enrollee with TennCare covered services that are not medically necessary and/or that overutilize the TennCare program.” **TENN. COMP. R. & REGS. §§ 1200-13-13.08(4)(a) and 1200-13-14-.08(4)(a).**

**Tennessee Medical Practice Act Rebate Prohibition**

The Tennessee Medical Practice Act prohibits, on an all-payer basis, a physician from “giving or receiving, or aiding or abetting the giving or receiving, of rebates, either directly or indirectly.” **TENN. CODE ANN. § 63-6-214(b)(16).** For purposes of this Act, there is no definition of the term “rebate.”

**TBME Advertising/Anti-Kickback Prohibition**

Under **TENN. COMP. R. & REGS. § 0880-02-.13(4)(t)** issued by the Tennessee Board of Medical Examiners (TBME), a medical doctor may be subject to discipline for using an advertisement that includes “directly or indirectly offering, giving, receiving or agreeing to receive any fee or other consideration to or from a third party for the referral of a patient in connection with the performance of professional services.” This regulation has been interpreted by the TBME and the Tennessee Court of Appeals to apply to benefits or discounts offered to patients.

Note that this regulation was not affected by the repeal of **TENN. CODE ANN. § 63-1-120(a)(discussed below) because TMBE’s authority to issue the regulation is in other Tennessee statutes.**
**Repealed Tennessee Division of Health, Related Boards Discount Prohibition**

Prior to June 11, 2010, pursuant to TENN. CODE ANN. § 63-1-120(a)(18), the Tennessee Department of Health, Division of Health Related Boards prohibited, on an all-payer basis, the “offering of discounts or inducements to prospective patients by means of coupons or otherwise to perform professional services during any period of time for a lesser or more attractive price.” This statute affected not only physicians but all providers regulated by the various Health Related Boards of the Department of Health. This statute was revised in 2010 to delete § 63-1-120(a), including this prohibition of discounts.

**Tennessee Medical Laboratory Act Anti-Kickback Prohibition**

TENN. CODE ANN. § 68-29-129(11)(2012) makes it unlawful for any person to “solicit the referral of specimens to such person’s or any other medical laboratory or contract to perform medical laboratory examinations of specimens in a manner which offers or implies an offer of rebates to a person or persons submitting specimens, other fee-splitting inducements, participation in any fee-splitting arrangements, or other unearned remuneration.”


The Attorney General concluded TENN. CODE ANN. § 68-29-129(7) would prohibit a clinical laboratory’s donation to a physician intended to cover the cost of electronic health records (EHRs) software. Such an arrangement is problematic “when the physician’s office that receives the EHR donation either continues an existing referral arrangement with the donating laboratory or subsequently initiates an arrangement for referral of specimens to the donating laboratory for analysis.” The Attorney General further explained that “... even the implication of an offer by a medical laboratory or other entity listed under TENN. CODE ANN. § 68-29-129(7) of a rebate, fee-splitting inducement, fee-splitting arrangement or ‘other unearned remuneration’ to a person or persons submitting specimens is prohibited.” Lastly, the Attorney General added that TENN. CODE ANN. § 68-29-129(7), which is part of the Tennessee Medical Laboratory Act, is a state anti-kickback provision beyond the preemptive reach of “[t]he qualified federal ‘safe harbor’ for EHR donations by clinical laboratories at 42 CFR § 1001.952(y) . . . .”

**FEE SPLITTING**

Tennessee law includes a number of prohibitions against fee splitting. The statute most often cited is a prohibition on physician fee splitting. There are additional restrictions applicable to dentists and laboratories that similarly restrict the sharing of fees of professional fees.

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3 A list of the Health Related Boards, Councils, and Committees that are within the Tennessee Department of Health, Division of Health Related Boards is available at https://health.state.tn.us/boards/boards.htm (last accessed on May 12, 2013).
**Physician Fee-Splitting Prohibition—TENN. CODE. ANN. § 63-6-225**

**TENN. CODE. ANN. § 63-6-225** makes it “an offense for any licensed physician or surgeon to divide or to agree to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee or compensation, or against whom the fee may be charged . . . (b) [P]hysicians [are not prohibited] from compensating any independent contractor that provides goods or services to the physician on the basis of a percentage of the physician’s fees generated in the practice of medicine. The percentage paid must be reasonably related to the value of the goods or services provided. Payments by physicians in return for referrals are prohibited. (c) A violation of this section is a Class B misdemeanor.”

Before its amendment on June 12, 1995, **TENN. CODE. ANN. § 63-6-225** was interpreted by the Attorney General’s office in 1994 and 1995 (please see discussion below).\(^4\) Subsequently, the Tennessee General Assembly amended **TENN. CODE. ANN. § 63-6225** to specifically permit percentage-based management fees if the percentage paid is reasonably related to the value of the goods or services provided. However, the exception notes that any payments made by physicians in return for referrals are still prohibited.


In this opinion from the Attorney General, the Attorney General concluded that **TENN. CODE ANN. § 63-6-225** prohibits and makes it “an offense for any licensed physician or surgeon to divide or to agree to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person without the knowledge and consent of the person paying the fee . . . .” In this opinion expanding on Tenn. Op. Attorney General No. U94-161 (1994), the Attorney General cites “strong evidence” of the legislature’s intent that the fee-splitting prohibition found at **TENN. CODE ANN. § 63-6225** not be limited “to the situation where a physician divides his or her fee with someone who has made a referral to the physician,” but prohibits any division of fees or any agreement to divide fees in virtually any situation involving a physician or surgeon. The opinion notes, however, that a medical board might narrow the application of this statute.


In reviewing **TENN. CODE ANN. § 63-6-225**, the Attorney General explained “that [the statute] specifically prohibits a physician from sharing the profits received from or on behalf of patients with any person without the knowledge and/or consent of the person paying the fee . . . .” The opinion adds that a court or jury could reasonably conclude that “a physician, or professional corporation comprised of physicians . . . paying a percentage of the gross collections generated by the physician or professional corporation to an ‘independent practice management firm or association’ for management services such as billing, collection, office

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\(^4\) See 1995, ch. 466, § 2.
staffing, equipment leasing and other administrative services, as well as ‘consultation designed to improve the operation, efficiency and profitability of the medical practice,’” would constitute fee-splitting in violation of TENN. CODE ANN. § 63-6-225.

**Case Law**

The equity of a physician group organized as a corporate under Tenn. Code was held by the physicians who practiced in the group and by the group’s non-physician CEO. The group recruited a new physician to the practice. After problems arose, the group sued the new physician for violating the terms of his employment agreement with the group. The new physician argued that the employment agreement was unenforceable because it allowed a non-physician to be compensated through a percentage of net profits generated by the licensed physician.

The Court of Appeals held that the contract did violate the fee-splitting provision in Tenn. Code. Ann. § 63-6-225. Although the Court found that the violation rendered the contract voidable by the new physician, the Court held that by living under the terms of the employment agreement, the new physician had ratified the voidable contract by his actions and was estopped from avoiding its terms.

**Cookeville Regional Medical Center Authority v. Cardiac Anesthesia Services, PLLC, No. M2007-02561-COA-R3-CV(Nov. 24, 2009).**
In this case, the Tennessee Court of Appeals held that a contract between a hospital and an anesthesia group practice was illegal under TENN. CODE ANN. § 63-6-225. In a contract dispute between the two parties, the hospital alleged that the contract was unenforceable because its terms were in violation of the Tennessee physician fee-splitting prohibition.

The court analyzed the contractual relationship under the statute and reviewed whether one of the two statutory exceptions applied. First, the statute permits fee splitting with the “knowledge and consent of the person paying the fee.” Second, the statute allows dividing a fee if the portion paid to the non-physician constitutes compensation for goods or services at a level that is “reasonably related to the value” of those goods or services and as long as the payment is not in return for referrals.

The contract at issue in this case provided that the physician group would bill and collect for all of its cardiac anesthesia services, and then the physician group would turn over all of its collections to the hospital, less a 20% billing and collection fee. In addition, the physician group received a fixed monthly payment from the hospital for the cardiac anesthesia services provided. In essence, the contract provided a subsidy for the anesthesiologists in return for covering the cardiac anesthesia program at the hospital.
The court concluded that the contract contained a clear violation of the fee-splitting prohibition and that neither exception applied. However, the court stated that a finding that the arrangement as one “prohibited” by TENN. CODE ANN. § 63-6-225 was not “tantamount to finding that any party [to the agreement] committed a misdemeanor or is liable under TENN. CODE ANN. § 63-6-226.”

**Other Restrictions on Fee Splitting**

**Physician Cross-Referral Prohibition**

**TENN. CODE ANN. § 63-6-604** prohibits “Cross referral arrangements or schemes between physicians or between physicians and entities, in which the physician or physicians know or should know that the arrangement has as its principal purpose generating referrals to an entity that if made directly by one of the participating physicians.”

**Tennessee Medical Laboratory Act Fee-Splitting Prohibition**

**TENN. CODE ANN. § 68-29-129(7)** makes it unlawful for any person to “solicit the referral of specimens to such person’s or any other medical laboratory or contract to perform medical laboratory examinations of specimens in a manner which offers or implies an offer of rebates to a person or persons submitting specimens, other fee-splitting inducements, participation in any fee-splitting arrangements, or other unearned remuneration.”

**Chiropractic Fee-Splitting Prohibition**

Pursuant to **TENN. CODE. ANN. § 63-4-114(6),** the Tennessee Board of Chiropractic Examiners “has the duty and authority to suspend for a specified time, within the discretion of the board, or to revoke any license to practice chiropractic, or to otherwise discipline any licensee or refuse to grant any certificate of fitness, whenever the licensee or applicant” is found guilty of dividing “fees or agreeing to split or divide fees received for professional services with any person for bringing or referring a patient.”

**Repealed Department of Health Discount Prohibition**

Prior to June 11, 2010, pursuant to **TENN. CODE ANN. § 63-1-120(a)(11) and (12),** the Tennessee Department of Health, Division of Health Related Boards has the power to revoke or suspend any license, whenever a licensee is found to be engaging in the “division of fees or agree[ing] to split or divide fees received for professional services with any person for bringing or referring a patient.” Moreover, physicians may not engage in solicitation through agents or “persons popularly known as ‘cappers’ or ‘steerers,’ of professional patronage” or profit from acts of those representing themselves as agents of the physician. This statute was revised in 2010 to delete § 631-120(a), including the prohibitions on fee splitting.
3) PROHIBITIONS ON SELF-REFERRAL

Tennessee Self-Referral Law

Overview

Tennessee’s self-referral law (TN Self-Referral Law) broadly prohibits physicians from referring patients for any health care service to a health care entity in which the physician has an investment interest, unless the referring physician owner performs health care services at the entity or the referring physician’s investment interest satisfies the statutory exceptions discussed below. **TENN. CODE ANN. § 63-6-602(a).** In contrast to the federal Stark Law, the TN Self-Referral Law applies only to physician owners. However, the TN Self-Referral Law applies regardless of payer source and covers all services, not just designated health services as defined by the Stark Law. The TN Self-Referral Law applies to both physicians licensed by the Tennessee Board of Medical Examiners or the Tennessee Board Osteopathic Examination. **TENN. CODE ANN. § 63-9-106(b)(1).**

Key Definitions—**TENN. CODE. ANN. § 63-6-601, § 63-6-608**

1. The term “entity” or “health care entity” is defined as a “health care facility and an agency, company or health care professional, other than the referring physician, providing health care services.”

2. The term “health care facility” is defined as any “real property or equipment of a health care institution as the term is defined in § 68-11-1602.”

3. The term “health care service” is defined as “diagnostic, treatment, therapy or rehabilitation service.”

4. The term “investment interest” does not include a publicly traded entity in which such physician has an investment interest if all of the following requirements are met.
   a. The entity’s stock is listed for trading on the New York Stock Exchange or the American Stock Exchange or is a national market system security traded under an automated interdealer quotation system operated by the National Association of Securities Dealers;
   b. The entity had, at the end of the corporation’s most recent fiscal year, total assets of at least $50,000,000, determined in accordance with generally accepted accounting principles, related to the furnishing of health services;
   c. The entity markets and furnishes its services to physician investors and other physicians on the same and equal terms;
   d. All stock of the entity, including the stock of any predecessor privately held company, is one class without preferential treatment as to status or remuneration; The entity does not issue loans or guarantee any loans for physicians who are in a position to refer patients to such entity if the physician uses any portion of the loan to obtain the investment interest;
   e. The income on the physician's investment is not tied to referral volumes and is directly proportional to the physician’s equity interest in the entity;
   f. The physician's investment interest does not exceed 0.5% of the entity’s total equity; and
   g. The physician purchases the investment interest either:
(1) On terms generally available to the public; or
(2) In exchange for an investment interest acquired by the physician before July 1, 1993; provided, the terms of the exchange are consistent with fair market value in an arms-length transaction and are not related to the volume or value of any referrals from the physician to the corporation and the investment interest is not held after December 31, 1997.

Exceptions

Premises and Equipment Leases—TENN. CODE. ANN. § 63-6-602(b)
The lease exception states that the TN Self-Referral Law does not apply to physicians when a health care facility leases premises or equipment from an entity owning the premises or equipment, even if physicians have an ownership interest in the entity that leases the premises or equipment to the health care facility and refer patients to the health care facility, if the following conditions are met:

1. There is a written lease agreement between the health care facility leasing the premises or equipment and the entity owning the premises or equipment;
2. The lease specifies the premises or equipment covered by the lease;
3. The term of the lease is for not less than one year;
4. The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions, and is not determined in a manner that takes into account the volume or value of any referrals by physicians having an ownership interest in the entity leasing the premises or space to the health care facility; and
5. A physician having an ownership interest in the entity leasing the premises or space to the health care facility discloses that interest to any patient referred by the physician to the health care facility.

It is of interest to note that this exception applies only to physician ownership in entities owning space or equipment and only with respect to referrals by the physician to the health care facility that leases the space or equipment from the physician-owned entity. This appears to be inconsistent with the prohibition under the TN Self-Referral Law that applies only to a referring physician’s ownership interest in a health care facility and does not explicitly prohibit a referring physician from ownership in an entity owning space or equipment as addressed in the lease exception.

Physical Therapy Services—TENN. CODE. ANN. § 63-6-602 (c)
An exception applies to limited circumstances where the referring physician refers physical therapy services provided that the referring physician in writing:

1. Discloses the physician’s investment interest or financial relationship to patients when making a referral of the patient for physical therapy services;
(2) Notifies patients that they may receive physical therapy services at the provider of their choice;
(3) Informs patients that they have the option to use one of the alternative providers; and
(4) Assures patients that they will not be treated differently by the physician if they do not choose to use the physician-owned entity.

Community Need—TENN. CODE. ANN. § 63-6-603
An exception applies to certain situations in which the health care entity would not otherwise be built or instituted and a need exists when there is no entity of reasonable quality in the community or the use of existing entities is onerous for patients, provided the following requirements are met:

(1) Individuals who are not in a position to refer patients to the entity shall be given a bona fide opportunity to invest in the entity, and be able to invest on the same terms that are offered to referring physicians. The terms on which investment interests are offered to physicians shall not be related to the past or expected volume of referrals or other business from the physicians;
(2) There is no requirement that any physician investor make referrals to the entity or otherwise generate business as a condition for remaining an investor;
(3) The entity shall not market or furnish its items or services to referring physician investors differently than to other investors;
(4) The entity shall not loan funds or guarantee a loan for physicians in a position to refer to the entity;
(5) The return on the physician’s investment shall be tied to the physician’s equity in the entity rather than to the volume of referrals;
(6) Investment contracts shall not include “non-competition clauses” that prevent physicians from investing in other entities;
(7) Physicians shall disclose their investment interest to their patients when making a referral. Patients shall be given a list of effective alternative entities if any such entities become reasonably available, informed that they have the option to use one of the alternative entities, and assured that they will not be treated differently by the physician if they do not choose the physician-owned entity. These disclosure requirements also apply to physician investors who directly provide care or services for their patients in entities outside their office practice;
(8) The physician’s ownership interest shall be disclosed, when requested, to third-party payers;
(9) An internal utilization review program is established to ensure that investing physicians do not exploit their patients in any way, such as by inappropriate or unnecessary utilization; and
(10) When a physician’s financial interest conflicts so greatly with the patient’s interest as to be incompatible, the physician shall make alternative arrangements for the care of the patient.

**Preexisting Investments and Disposal of Ownership Interests**

**Preexisting Investments—TENN. CODE ANN. § 63-6-605**

“If Physicians have invested in entities prior to July 1, 1993, the physicians shall reevaluate their activity in accordance with the provisions of this part and comply with its provisions. If compliance with the need and alternative investor criteria is not practical, it is essential that the identification of reasonably available alternative entities be provided.”

**Disposal of Ownership Interests—TENN. CODE ANN. § 63-6-606**

“(a) On or after July 1, 1995, all physicians are required either to: (1) Dispose of their ownership interests in entities outside their office practice at which they do not directly provide care or services when they have an investment interest in the entity unless the entity meets the requirements of § 63-6-602; or (2) Cease referring patients to such entities. (b) Physicians are encouraged to seek out potential buyers of a minority race before disposing of facilities or equipment regulated by this part. Upon request, the office of minority business enterprise in the department of economic and community development shall provide information relative to potential minority purchasers.”

**Violations**

Violations of the TN Self-Referral Law may result in sanctions against the physician. Willful violations are considered unprofessional conduct, which is subject to licensure sanction by the Tennessee Board of Medical Examiners or Tennessee Board of Osteopathic Examination, as applicable, including suspension, revocation, or other restrictions. TENN. CODE ANN. § 63-6-607 and § 63-9-106(b)(2). The relevant board is authorized to impose civil penalties of an amount up to $5,000 for each prohibited referral. *Id.*

While the penalty sub-section specifies *willful* conduct, it is notable that a separate subsection has a lower threshold and specifies that “cross referral arrangements or schemes between physicians or between physicians and entities, in which the physician or physicians know or should know that the arrangement has as its principle purpose generating referrals to an entity that if made directly by one of the participating physicians” would be considered a violation. TENN. CODE ANN. § 63-6-604.

**Tennessee Physicians’ Conflict of Interest Disclosure Act**

The Tennessee Physicians’ Conflict of Interest Disclosure Act of 1991 (Conflict of Interest Act), enacted prior to the TN Self-Referral Law, acknowledges that physicians may enter into lawful contractual relationships (i.e., ownership in health facilities, equipment, or pharmaceuticals), but that such relationships can create potential conflicts of interest. TENN. CODE ANN. § 63-6-502. The Conflict of
Interest Act is primarily a disclosure statute rather than an outright prohibition on self-referrals. The Conflict of Interest Act requires that any potential conflict of interest be addressed by the following:

1. The physician has a duty to disclose to the patient or referring colleagues such physician’s ownership interest in the facility or therapy at the time of referral and prior to utilization;
2. The physician shall not exploit the patient in any way, as by inappropriate or unnecessary utilization;
3. The physician’s activities shall be in strict conformity with the law;
4. The patient shall have free choice either to use the physician’s proprietary facility or therapy or to seek the needed medical services elsewhere; and
5. When a physician’s commercial interest conflicts so greatly with the patient’s interest as to be incompatible, the physician shall make alternative arrangements for the care of the patient.

6. *Id.*

**Consistency with Federal Law—TENN. CODE ANN. § 63-6-503**

“Nothing in [the Physicians’ Conflict of Interest Disclosure Act of 1991] is intended to nor shall it permit any action that is inconsistent with the federal Patient and Program Protection Act of 1987 [42 U.S.C. § 1320a-7d (2006)], or other provisions of federal law that prohibit such arrangements as a condition to receipt of federal funds.”

**Other Restrictions on Referrals**

TENN. CODE, ANN. § 63-6-204(f)(1)(B)(i)-(iii) restricts entities permitted to employ licensed physicians (e.g., licensed hospitals) from restricting or interfering with physician referral decisions unless: (1) the employed physician agrees in writing to the specific restrictions at the time the contract was executed; (2) the restriction does not, in the reasonable judgment of the physician, adversely affect the health or welfare of the patient; and (3) the employing entity discloses any such restrictions to the patient.

TENN. CODE, ANN. § 68-11-205(b)(11) restricts entities that employ physicians from interfering with patient referral decisions in a manner that unnecessarily increases cost to patients of the medical service being provided.


The Attorney General opined that reimbursing physical and occupational therapy (PT/OT) facilities differently based on whether a referring physician has an interest in the facility does not violate the equal protection provisions of the Tennessee Constitution. Decreased reimbursement to “physician-affiliated” PT/OT facilities relative to “independently-owned” PT/OT facilities under two of the medical fee schedule rules—TENN. COMP. R. & REGS. 0800-2-18.02(4)(a) and TENN. COMP. R. & REGS. 0800-2-18-.09—bears a rational relationship to the state’s legitimate interest in reducing workers’ compensation premiums. Lower profits for a physician-
affiliated facility reduces a “referring physician’s incentive to make unnecessary referrals, thereby decreasing costs to insurance companies.”

The Attorney General concluded “it is clear that the mere referral of a child to a dentist by a physician is permitted under Tennessee law.” Through analogy to TENN. CODE. ANN. § 63-6-502—a statute addressing a physician’s referral to another medical facility or medical professional—the Attorney General deemed permissible a physician’s referral of a child to a dentist “as long as the physician is not profiting in any way from the referral itself and does not have any other commercial interest in the referral . . . .” Further, “even if the referring physician has a commercial interest in the dental referral, the referral may remain proper if the interest is disclosed and the patient may choose an alternate dental facility.”

### 4) UNFAIR BUSINESS PRACTICES

**Tennessee Consumer Protection Act—TENN. CODE ANN. § 47-18-101, et seq.**
The Tennessee Consumer Protection Act (TCPA) was enacted to promote the following policies: “(1) to simplify, clarify, and modernize state law governing the protection of the consuming public and to conform these laws with existing consumer protection policies; (2) to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state; (3) to encourage and promote the development of fair consumer practices; (4) to declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state; and (5) to promote statewide consumer education.” TENN. CODE ANN. § 47-18-102.

The TCPA prohibits certain listed unfair or deceptive acts or practices, including, but not limited to: (1) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (2) disparaging the goods, services, or business of another by false or misleading representations of fact; and (3) advertising goods or services with intent not to sell them as advertised. TENN. CODE ANN. § 47-18-104.

In order to establish a claim pursuant to the TCPA “a plaintiff must prove (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA; and (2) that the defendant's conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated . . . .” *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 378 (6th Cir. 2007).
The TCPA includes a catch-all provision that is to be enforced only by the Attorney General’s office and consumer protection division. Specifically “engaging in any other act or practice which is deceptive to the consumer or to any other person; provided, however, that enforcement of this subdivision (b)(27) is vested exclusively in the office of the attorney general and reporter and the director of the division.” § 47-18-104(b)(27).

**Attorney General Enforcement Actions and Settlements—Division of Consumer Affairs**

In 2006, the Attorney General entered into a settlement agreement with The Right Solution after joining several states in filing suit against the company, who marketed a “hormone cream.” The Attorney General alleged that The Right Solution: (1) falsely advertised that certain other hormone drugs had been recalled by the U.S. Food and Drug Administration (FDA); and (2) misrepresented that The Right Solution’s product was clinically proven to be safe and effective. In the settlement, The Right Solution agreed to stop selling the cream product or any other drug products as treatments for human illnesses or diseases, unless they are first approved by FDA. Further, The Right Solution agreed to not make any health claims in advertisements unless there was clinical research proving their claims to be true. The Right Solution agreed to return all of the payments it received from consumers who filed complaints about the cream products.

In 2012, Tennessee, along with several other states reached a $42.9 million agreement with Pfizer Inc. to resolve allegations that Pfizer Inc. unlawfully promoted two of its drugs. The Attorney General alleged that Pfizer Inc. made misleading and unsubstantiated superiority claims, and promoted off-label uses. As part of the agreed final judgment issued by the Davidson County Circuit Court (Court), Pfizer was prohibited from: (1) making any false, misleading, or deceptive claims when comparing the efficacy or safety of Zyvox to vancomycin; and (2) promoting any Pfizer product for off-label uses. The agreed final judgment also required Pfizer to: (1) design financial incentives that ensure that its marketing personnel are not motivated to engage in the improper marketing of Zyvox or Lyrica; and (2) notify its sales force promptly of any warning letter received from FDA that affects sales representatives in the promotion of Pfizer products.

In 2012, the Attorney General filed a complaint following an investigation into the operations of HRC Medical Centers Inc. for allegedly withholding important information about health risks and side effects of a hormone replacement therapy regimen, known as Amor Vie, and allegedly making a series of false, deceptive, and/or unsubstantiated claims about the hormone replacement therapy regimen. On October 8, 2012 the court issued a temporary restraining order to prohibit HRC Medical Centers Inc. from making unsubstantiated and misleading claims regarding Amor Vie. On December 27, 2012 the court appointed a temporary receiver over HRC Medical Centers Inc. that is to remain in effect until vacated or amended by the court. In addition, on December 27, 2012 the court issued a statutory temporary
injunction on the same terms as the temporary restraining order. The action before the court remains pending.

5) HELPFUL LINKS
- [Tennessee Attorney General Opinions](#)
- [Tennessee General Assembly](#)
- [Tennessee Medicaid (TennCare)](#)
- [Tennessee Department of Human Services](#)