

Stark Regrets: I Shouldn't Have Written That Law

Forbes Staff Writer David Whelan writes:

Congressman Fortney “Pete” Stark (D-Calif.) has long been the most influential member of the House when it comes to health care regulation. He has a whole set of eponymous laws to prove it. The Stark legislation, passed in two parts between 1989 and 1995, bans physicians from "self-referral," meaning that a doctor can't refer a patient to an physical therapy practice, lab or other facility that she owns part of because then she'll benefit from the revenue associated with the services provided. Without Stark, the theory goes, unnecessary and expensive procedures would proliferate.

The Stark laws, along with an older anti-kickback law that bans paying for patients, have had a huge impact on how medical business models are structured. Yet in an interview today the Congressman lamented that he had ever made his legislative intrusion into medical practices. The unintended consequences of trying to legislate good behavior, as Sen. John McCain would tell you about campaign finance reform, is too many lawyers looking for loopholes.

Stark says the idea first came to his attention when a member of his staff, who was both a physician and a lawyer (“The worse kind of staffer,” Stark says), was pushing for bright-line definitions of commissions or kickbacks. It wasn’t enough, Stark's staffer said, to say that "whomsoever shall giveth or taketh a kickback will get five years or \$50,000 in fines." Prosecutors were having trouble proving intent.

So began the process of writing the sometimes byzantine Stark laws. The Congressman had his doubts at the time: "I didn't think there was such a big deal. So the doctors wanted to make some extra money..." But then a study in Florida showed how much these self-referral arrangements were being abused. Some doctors would send every patient in for an X-ray at facilities they owned.

While the law's intent was good, the law banning these businesses might have done more harm than good, he says now: "It gave every shyster and promoter a loophole." A whole industry of Stark-compliant businesses was born--not unlike the sector devoted to tax avoidance. Stark had to rewrite and clarify the laws in 1995, and there's still debate about it. Currently Congress is looking into regulating the use of imaging machines in doctors' offices and fighting over banning doctor-owned specialty hospitals. "We now have to keep rewriting the laws like the tax code," Stark says.

Stark says that today he'd go back and strip down out the original fuzzy language so the law simply forbids kickbacks. "I think we would have stopped more of the shenanigans that way," he says. He concedes that he created a whole cottage industry of entrepreneurs and Stark law firms that create and sign off on convoluted legal arrangements between doctors and their vendors. "I get little thanks for it," he says.