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Whistleblower lawsuits help provide Stark and Anti-kickback Statute guidance

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The False Claims Act (FCA) is designed to protect the federal treasury and to deter fraud committed against the government. The FCA places power within the hands of private citizens, allowing them to become “private attorney generals,” and, with the assistance of an attorney paid on a contingent fee basis, challenge government payments on behalf of the government. The citizens who bring a case on behalf of the government (“whistleblowers”) can be employees, former employees, and/or competitors. They receive protection from retaliation under the FCA and obtain a share of the ultimate recovery for their work. Through their litigation, whistleblowers fight, prevent, and

deter fraud; their lawsuits can also provide Stark and Anti-kickback Statute guidance.

FCA actions may be predicated on violations of the Stark and Anti-kickback Statute. In simple terms, the Anti-kickback Statute prohibits any person/entity from offering or accepting cash or in-kind payment in exchange for the purchase, ordering, or recommending of goods/services. The Stark Statute prohibits paying cash or in-kind in exchange for referrals. The Stark Statute and the Anti-kickback Statute contain “safe harbors” which are considered “legitimate common business arrangements” and exempt the entities from the statutes if they comply with the elements. Complying with the statutes has however, proven to be difficult and thus, it is important to stay current on settlements and enforcement actions for cases where Stark and Anti-kickback violations are alleged, in order to report fraud and/or adjust policies accordingly.

The cases listed below show the types of FCA cases that have been brought for underlying violations of the Stark and Anti-kickback Statutes. In most of the cases listed below, the whistleblower brought the fraud to the government's attention by filing a FCA case and received a portion of the settlement.

- *United States ex rel. Moilan v. McAllen Hospitals LP* (October 2009). The whistleblower, a former employee, alleged that the hospital had entered into financial relationships with doctors in exchange for referrals. Per the complaint, the hospital disguised the payments to doctors through “sham contracts” such as bogus medical directorships and lease arrangements. The hospital paid \$27.5 million to the government to settle the case, the whistleblower received \$5.5 million from the proceeds of the settlement.
- *United States ex. rel. Reimche v. Tulare Local Healthcare District* (2009): In this case, the whistleblower and former chief financial officer alleged that Tulare Healthcare paid kickbacks to physicians from 2001 through 2007 in the form of debt forgiveness and below-market rentals and purchase prices for office space in exchange for referrals of Medicare patients. The defendant settled the case for \$2.4 million.
- *United States ex rel Fry v. Health Alliance of Greater Cincinnati* (2010): In this case, Christ Hospital of Cincinnati was accused of engaging in a “pay-to-play scheme.” Whistleblower, Dr. Harry Fry, a cardiologist who used to work at Christ Hospital, alleged that the hospital referred patients to a cardiology practice whose doctors, in

turn, were allocated panel time at the hospital's outpatient testing unit, based on the amount of procedures they performed and revenue they generated.

The two organizations will pay \$108 million, including \$23.5 million to whistleblower Dr. Harry Fry, to settle the allegations that the assignment of physicians to the cardiac testing station resulted in the inducement of local cardiologists to refer patients to the hospital.

■ The Detroit Medical Center (December 2010)¹ agreed to pay the federal government \$30 million to settle claims that it engaged in improper financial relationships with referring physicians. The settlement resolved allegations that the DMC violated several federal laws, including the Anti-kickback Statute and the Stark Statute, which restrict the financial relationships that hospitals may have with doctors who refer patients to them. Most of the relationships at issue in the DMC matter involved office lease agreements and independent contractor relationships that were either inconsistent with fair market value or not put in writing.

■ Christiana Care Health System in Wilmington, Delaware (March 2010)² agreed to pay \$3.3 million to settle claims made by a whistleblower that the health system allegedly

paid kickbacks to neurologists for referring patients to its Wilmington hospital. According to the charges, Christiana Care overpaid physicians at Neurology Associates for in-hospital readings of EEGs allegedly as a "reward" for referring patients to the hospital. The court documents noted the payments were part of a contract dating to 1989, prior to the enactment of the current Stark Act. The whistleblowers in the lawsuit were a group of physicians from a competing neurology group and will receive \$190,000 in the settlement.

■ Tuomey Hospital was ordered in June 2010 to pay the federal government \$44.9 million plus interest for a Stark Act violation.³ A federal jury found Tuomey Hospital in Sumter, South Carolina, part of Tuomey Health System, guilty of violating the Stark Act for providing kickbacks to physicians in return for referrals at the hospital. This case involved the providing a number of part-time employment arrangements to physicians that exceeded fair market value and were nothing more than vehicles to reward referrals. A federal jury found the hospital guilty of violating the Stark Act for the contracts, which it began offering to physicians in 2004. Tuomey may

face a new trial on an alleged False Claims violation.

■ University of Medicine and Dentistry in Newark, New Jersey (2009)⁴ settled with the government for \$8.3 million. Here, the government alleged the hospital illegally paid kickbacks to cardiologists in exchange for referring patients to the hospital. The government alleged that the hospital experienced a drop in certain cardiac procedures that jeopardized the hospital's Level 1 Trauma Center status. As a result, the hospital allegedly provided local cardiologists contracts for part-time employment, which the government alleged only served as vehicles to provide illegal kickbacks.

■ Covenant Medical Center in Waterloo, Iowa (2009)⁵ settled a case for \$4.5 million for alleged violations of the Stark Law and False Claims Act. The alleged violations stemmed from compensation that Covenant paid to five physicians employed by the hospital who referred patients to it. It was reported that the physicians were among the highest paid physicians in the entire U.S., making as much as \$2.1 million. The CEO states that a competing independent physician group reported this fraud to the government. The government

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would not comment on how it determined fair market value, but the significant discrepancies between the compensation of the five Covenant physicians and other physicians in the region and around the country led the US Attorney's Office for the Northern District of Iowa to conclude that the hospital was paying the physicians for referrals, in violation of the Stark Law.

From 2001 through 2010, there were nearly 100 different physician self-referral and kickback settlements; 20 of the settlements have occurred in just two years, 2008 through 2010. At the same time, there has been an upswing of interest by hospitals and other health care entities to align more closely with physicians. Many of the more recent settlements and actions involve alleged improper attempts at aligning with physicians; and the type of whistleblowers in these actions ranged from former and current employees, competitive practice groups, doctors, and management.

A review of the recent settlements and enforcement actions provides the following non-exclusive categories of potential Stark Statute and Anti-kickback Statute violations for which a whistleblower can bring a claim under the FCA.

The different types of Stark and/or Anti-kickback Statute violations involve the hospital or entity:

- providing free services or staff, including administrative assistants, physicians assistants, athletic trainers, or information technology to a practice group of physicians;
- paying for services not really needed, including paying for medical directorships or providing part-time employment (those relationships that are entered into that don't have a true purpose other than to reward physicians for referrals);
- providing discounts on items, such as insurance or leased space;
- paying physicians under contract different amounts than are contracted (e.g., a hospital may contract a physician at a fair market rate for a medical directorship, but then actually compensate the physician at a higher rate);
- physician compensation arrangements not meeting fair market value and commercial reasonableness thresholds; and
- compensating physicians for work they did not or do not perform (e.g., if the hospital/entity pays a portion of a physician's salary in exchange for the physician's performing teaching, research, and clinical duties,

and the physician does not fulfill the contractual obligation to teach, research, or perform clinical duties, this could be a potential Stark Statute violation).

The importance of complying with Stark and Anti-kickback Statutes has never been more important. The settlements and enforcement actions based on the Stark and Anti-kickback Statutes, as described above, clearly reflect whistleblowers' and the government's readiness to seek remuneration related to violations. Such settlements and actions have brought millions of dollars to the federal and state governments. Between 1987 and 2009, the average reward paid to a whistleblower was \$1.9 million. In order to avoid such liability and comply with the statutes, it is important to be aware of the current enforcement actions and adjust policies and compensation arrangements accordingly. ■

1. See <http://www.justice.gov/opa/pr/2010/December/10-civ-1484.html>
2. See <http://www.justice.gov/usao/de/press/2010/Christiana%20Care%20PR.pdf>
3. See http://www.theitem.com/news/article_06cb1712-3bac-11df-b09c-001cc-4c002e0.html
4. See http://www.nj.com/news/index.ssf/2009/09/umdnj_to_pay_83_million_to_set.html
5. See <http://www.justice.gov/opa/pr/2009/August/09-civ-849.html>