



The federal government continues to ramp up its prosecutions of healthcare providers for False Claims Act (FCA), Stark Law and anti-kickback violations. Two recent cases announced by the Department of Justice (DOJ) include settlements with Florida's Halifax Hospital Medical Center and Ohio's Memorial Hospital. The two cases yielded a combined \$93.5 million to the government stemming from charges of improper payments made to 11 physicians.

HALIFAX HOSPITAL MEDICAL CENTER

The government announced on March 10, 2014 that Halifax Hospital Medical Center and its affiliated staffing company, Halifax Staffing, Inc. (collectively, Halifax), agreed to pay the federal government \$85 million and enter into a Corporate Integrity Agreement to settle allegations of improper billing for services referred by six oncologists and three neurosurgeons. The government claimed that the compensation packages were excessive or varied based on referrals and therefore, failed to satisfy any exception under the Stark Law, thereby causing all related billings by Halifax to violate the FCA. The case originated in 2009 when Halifax's physician services director, Elin Baklid-Kunz, filed a *qui tam* whistleblower lawsuit in federal court against her employer. The government intervened on the charges of excessive payment to the nine physicians at issue, leaving the remaining charges for Ms. Baklid-Kunz's attorneys to litigate.

The Stark Law prohibits physicians and their immediate family members who have a financial relationship with an entity from referring Medicare patients to that entity for designated healthcare services, and prohibits the entity from billing Medicare for the services. There are a number of exceptions where such referrals are permissible and it is incumbent upon the billing healthcare provider to demonstrate that one or more of the exceptions is satisfied.

The issue in Halifax was whether the oncologists and neurosurgeons were receiving compensation in excess of fair market value or tied to their volume of referrals, both violations of the Stark Law.

The oncologists entered into employment agreements with Halifax that provided them a base salary and incentive bonus. A bonus pool equal to 15 percent of the operating margin for the medical oncology program was established and divided among the oncologists based on services personally performed by each of them.

In November 2013, the Court ruled in favor of the government's position that Halifax's incentive bonus formula violated the Stark Law. The Court rejected Halifax's argument that the bonuses met the Stark Law's employment exception that allows productivity bonuses based on services personally performed by physicians. The Court reasoned that under the Halifax employment agreements, any one of the oncologists could increase the size of the bonus pool by simply making more referrals, thereby increasing his or her bonus based on those referrals. The Court made no determination as to the three neurosurgeons' compensation packages, although the government alleged that their compensation exceeded fair market value as well.

In addition to the charges of excessive payments to the six oncologists and three neurosurgeons, the complaint against Halifax included allegations of unnecessary short stay admissions and Stark Law violations relating to referrals by other physicians. The government chose not to intervene on these charges, and they are scheduled to be litigated at trial this summer.

Although she blew the whistle on Halifax and filed the original *qui tam* suit, Ms. Baklid-Kunz continues to work for the hospital system and will receive \$20.8 million of the \$85 million settlement. Her attorneys will also be awarded additional attorneys fees by Halifax above the \$85 million settlement amount.

[Click here](#) to read the DOJ press release.

[Click here](#) to read the Corporate Integrity Agreement between the HHS Office of Inspector General (OIG) and Halifax.

MEMORIAL HOSPITAL

The government announced on March 14, 2014 that Fremont, Ohio-based Memorial Hospital (Memorial) settled claims of violations of the Stark Law and anti-kickback statute, resulting in violations of the FCA. Memorial agreed to pay \$8.5 million to resolve the allegations, which stemmed from two arrangements that the hospital self-disclosed to the government:

1. A joint venture with a pain management physician; and
2. A financial arrangement with an ophthalmologist wherein the ophthalmologist purchased intraocular lenses and resold the lenses to Memorial at an inflated markup.

The settlement covered referrals of Medicare and Medicaid patients, and included a payment to the State of Ohio as well.

[Click here](#) to read the DOJ press release.

OTHER CASES

Without question these settlements will draw the attention of potential whistleblowers and plaintiffs' attorneys, as well as prosecutors and regulators throughout the country. Already, government prosecutors have shown a keen interest in excessive compensation and potential kickbacks to physicians as viable FCA cases, as illustrated by the \$237 million FCA/Stark Law verdict entered against Tuomey Healthcare System last year and by the government's intervention in pending lawsuits. For example, the DOJ intervened last year in a *qui tam* action against Infirmity Health System and its affiliated diagnostic and medical clinic companies based in Mobile, Alabama, alleging violations of the Stark Law and anti-kickback statute

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based on physician bonus payments. In addition, just two months ago in January 2014, the DOJ intervened in eight *qui tam* actions against Health Management Associates hospitals in various states alleging, among other things, Stark Law violations and illegal kickbacks to emergency physician groups to induce unnecessary patient admissions. Moreover, whistleblowers can pursue *qui tam* actions with or without support from the government.

DO YOU HAVE A CULTURE OF COMPLIANCE?

The increased scrutiny of physician financial relationships creates substantial risks for a broad range of hospitals, physicians and other healthcare providers, whether they refer patients or rely on referrals from others. Financial arrangements, including those entered into in good faith, face potential challenges by employees and competitors turned whistleblowers and government officials that can be costly to all parties involved. These include providers who submit claims generated by tainted referrals, as well as to those generating the referrals. Physicians, hospitals and other healthcare providers face exposure for false claims, Stark Law violations and charges of illegal kickbacks. Even if never viewed as criminal activities, these violations can result in civil monetary penalties, mandatory exclusion (including executives of hospitals and other providers) and discipline by a state medical board or other licensing authority. Moreover, once your name is listed as having violated one of these provisions, private insurance companies routinely follow through by terminating your coverage as well.

Financial arrangements should be structured in a manner to best address potential attacks by prosecutors and regulators, who tend to view such arrangements with cynical eyes, as well as by whistleblowers and their attorneys. Each financial arrangement that potentially implicates the Stark Law, anti-kickback statute or similar state laws needs to be examined in light of the particular circumstances, keeping in mind that an arrangement may be acceptable in some practice settings but not others. For example, the incentive bonus formula that resulted in findings of Stark Law and FCA violations in the Halifax case could be structured to comply with the Stark Law if implemented appropriately within a group practice.

Reexamination of existing financial relationships is appropriate in light of the aggressive positions recently taken by the government. It is crucial to maintain a culture of compliance through effective compliance programs and training, and to take internal complaints seriously. Of note, the whistleblower in the Halifax case filed her *qui tam* action only after she brought the issues to management's attention and felt her concerns were being ignored. Going forward—take it seriously.



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