

PUBLICATION

Justice Department Intervenes in Qui Tam Lawsuit Alleging Antikickback and Stark Violations [Ober|Kaler]

2013: Issue 17 - Focus on White Collar

The Justice Department recently intervened in a qui tam lawsuit against a home health provider and related individuals, alleging violations of the antikickback statute and the Stark Law, which also constituted alleged violations of the False Claims Act (FCA).¹ Under the FCA, the Justice Department is authorized to intervene in qui tam cases, although in a large majority of cases it declines to do so, allowing the relator to proceed independently. In this case, however, the Justice Department apparently perceived a policy objective that could be achieved by intervention. A review and comparison of the Justice Department's Complaint and the relator's Complaint may provide some clues regarding the Justice Department's possible rationale for intervening.

The Relator's Complaint

The relator alleged that the home health provider hired and paid the spouses of physicians to induce the physicians to refer Medicare patients for home health services. The spouses were hired to provide marketing services for the home health provider, but the employment arrangement was allegedly a "sham." The relator alleged that the spouses did not perform the same duties that were required to be performed by other employees with actual marketing responsibilities. Instead, the spouses allegedly were paid merely because the physicians to whom they were married referred patients for home health services. According to the relator, he expressed his concern to the provider that it may be violating the law and, therefore, requested the provider to obtain a formal opinion from a qualified lawyer that the arrangement was legal. The provider allegedly declined to seek such a legal opinion. The relator alleged that the provider continued to bill the Medicare program a large sum for home health services that violated the antikickback statute and the Stark Law.

The Justice Department's Complaint

The Justice Department's complaint was also based on the general allegation that the home health provider's arrangement with the physicians' spouses was a sham to induce the referral of Medicare patients for home health services. However, as is often the case when the government intervenes in a qui tam lawsuit, the Justice Department's allegations do not mirror the relator's allegations. Many of the Justice Department's allegations were based on documents obtained from the provider through a Civil Investigative Demand, which the relator could not have obtained on his own.

The Justice Department alleged not only that the home health provider's arrangement with the physicians' spouses was a sham, but also that the provider tried to "cover up" the fraudulent arrangement by fabricating personnel files, including manufactured employment contracts, job duties and performance reviews, to create the appearance that the spouses were legitimate employees with legitimate marketing duties. The complaint also alleged that the provider's "bona fide" marketing employees were required to have college degrees and marketing experience. By contrast, the physicians' spouses hired for marketing duties lacked such qualifications and did not perform the duties performed by the bona fide marketing personnel.

Furthermore, the Justice Department alleged that the home health provider gave false assurances to the physicians that the arrangements with their spouses were legal. The home health provider allegedly consulted

with a lawyer regarding the proposed arrangement with the physicians' spouses, but then allegedly ignored the lawyer's advice relating to how the arrangement must be structured. The provider also circulated a standardized document produced by the Florida Medicaid agency regarding the antikickback statute and Stark Law, which the provider allegedly misused to suggest that the provider's arrangement fell within a "safe harbor" under the antikickback statute and Stark Law.

Moreover, the Justice Department's complaint alleged that the home health provider falsely certified its compliance with the antikickback statute and Stark Law in various documents submitted to the Medicare program. The Justice Department also made detailed allegations regarding bonuses and other incentives paid to the physicians' spouses, as well as dramatic spikes in Medicare patient referrals following the provider's payments to the physicians' spouses. The provider's payments to the physicians' spouses allegedly violated the antikickback statute and the Stark Law. Because those alleged violations tainted the home health provider's payment requests to Medicare, the payment requests allegedly violated the FCA.

Message for Providers

Providers facing qui tam suits under the FCA are more likely to fare worse in cases where the government elects to intervene. Thus, it is worth considering what factors may encourage the government to intervene in a qui tam lawsuit.

Why did the Justice Department choose to intervene in this particular case? We may not know the answer with certainty, but some of the government's allegations (not included in the relator's complaint) suggest why the Justice Department wanted to prosecute FCA claims against this provider. The provider allegedly consulted with a lawyer, but then ignored the lawyer's advice. In addition, the provider allegedly gave assurances to the physicians and their spouses that the arrangement was legal, although the provider had no basis for offering such assurances. The provider also allegedly used Medicaid program materials in an attempt to legitimize an allegedly unlawful arrangement. Finally, the provider allegedly falsified several documents in an attempt to cover up its scheme. The government likely concluded this provider was particularly culpable because it allegedly was aware of the antikickback statute and Stark Law issues, yet allegedly tried to evade the law and then conceal its activity. This case underscores the importance of seeking regulatory advice from qualified counsel – and then following that advice.

¹ *United States ex rel. Guthrie v. A Plus Home Health Care, Inc.*, No. 12-cv-60629 (S.D. Fla.).