PUBLICATION

Court Puts the Brakes on Whistleblower's FCA Parking Claims

June 16, 2017

The Department of Justice (DOJ) reports that, in fiscal year 2016 ending September 30, it obtained more than $4.7 billion in settlements and judgments from civil cases involving fraud and false claims. More than half of this amount – $2.5 billion – came from the health care industry. One of the most valuable tools available to recover assets for federally funded programs such as Medicare and Medicaid are lawsuits filed under the qui tam provisions of the federal False Claims Act, 31 U.S.C. §§ 3729 et seq. (FCA), which allow a private citizen, known as a "relator," to bring a lawsuit on behalf of the United States.

Although the bulk of money is recovered in FCA cases in which DOJ decides to intervene and control the litigation, it is becoming more common for relators to pursue claims in which the government declines to intervene. Indeed, the steady barrage of headlines touting massive recoveries under the FCA serves to attract individuals looking for creative ways to capitalize on the prospect of substantial personal reward. The recent victory by BayCare Health Systems (BayCare) in a Tampa, Florida federal court is an example of a case in which the government did not intervene, but the relator nonetheless pursued his novel parking-related claims relentlessly for two years before BayCare ultimately prevailed. Baker Donelson represented BayCare in the federal court action.

The relator in the BayCare case was a certified general real estate appraiser from Nashville, Tennessee, who had been doing work for another hospital in the Tampa Bay area. He claimed to have used his "special skills" as an appraiser during that other work to uncover BayCare's alleged fraud. Even though the relator was the epitome of a corporate outsider to BayCare, he nonetheless filed an action under the FCA alleging that BayCare submitted or caused the submission of false claims to Medicare or Florida Medicaid for services provided to patients referred to one of BayCare's hospitals in violation of the Stark Law and Anti-Kickback Statute (AKS). When the government declined to intervene, the relator pressed forward on his own. *U.S. ex rel. Bingham v. BayCare*, Civ. Case No. 8:14-cv-73-T-23JSS (M.D. Fla.).

The relator's allegations of wrongdoing were based on the construction and occupation of two medical office buildings on a hospital campus; one of the buildings was owned by a third-party real estate developer, and the other was owned by a separate BayCare-affiliated corporate entity. With respect to the first building, the relator alleged that BayCare provided financial benefits to the third-party developer/landlord that were, in turn, passed along to the tenants in the office space leases they signed with the developer. The alleged benefits included a parking easement, parking on the hospital campus, maintenance of parking areas on the campus, an improper ad valorem tax exemption under Florida law and valet parking. With respect to the second building, the relator alleged that the primary tenant, a group of physicians employed by a BayCare-affiliated corporation, received an improper tax exemption and valet parking. According to the relator, all of the alleged benefits created either direct or indirect compensation arrangements in violation of the Stark Law and constituted illegal remuneration in violation of the AKS. During the course of the litigation, the relator advanced several novel arguments, including an effort to alter the statutorily defined relationship imposed by the Stark Law by relying on Florida contract and property law.

In April 2017, the court adopted the Magistrate Judge's Report and Recommendation granting BayCare's Motion for Summary Judgment on all of the relator's claims and entering judgment in BayCare's favor. Among other things, the court accepted the Magistrate Judge's determinations that:

- Relator failed to establish that the parking easement provided to the third-party real-estate developer in a ground lease was a direct compensation arrangement in violation of the Stark Law.
- Relator failed to establish an indirect compensation arrangement in violation of the Stark Law because he pointed to no evidence that the aggregate compensation paid to any referring physician varied with or took into account the volume or value of referrals.
- Relator failed to point to any evidence showing that physicians were offered or used valet parking.
- Relator failed to point to any evidence to even suggest that one purpose of the alleged remuneration – whether parking, valet or otherwise – was for the purpose of inducing referrals.
- Relator's challenges to the determination of a county official regarding property taxation were not before the court.

Baker Donelson's Comments: Implications for the Future

Whistleblower actions in the health care space asserting false certification theories of liability based on compliance with the Stark Law and AKS appear to be on the rise. These statutes and their respective regulations are difficult to navigate and fraught with pitfalls for non-compliance. Such complexity provides an attractive area for a would-be-whistleblower to explore and potentially exploit. This is especially true for the Stark Law, which is a strict liability statute. Whistleblowers therefore are creating novel theories of liability designed to increase the likelihood of surviving a motion to dismiss and capitalizing on the complex regulatory environment and resulting potential for a misstep. This can potentially open the door to extensive discovery, resulting in the expenditure of millions of dollars.

Real estate transactions, including the ownership and lease of medical office buildings on hospital campuses, present a variety of complex regulatory compliance issues. These transactions may receive increased attention from whistleblowers. Health care entities should be increasingly rigorous in their compliance efforts to ensure that their relationships are appropriately documented and in compliance with the Stark Law and the AKS. This will help reduce the risk that a whistleblower action under the FCA is filed and, if filed, increase the likelihood of obtaining a total victory.