

Record Mega-Settlements May Attract More Whistleblowers

December 23, 2015

September was a record-setting month for the U.S. Department of Justice, which entered into major health care fraud settlements with two large Florida-based hospital systems. The settlements were made in the face of two whistleblower lawsuits filed against the North Broward Hospital District (NBHD) and Adventist Health System (AHS), alleging violations of the Stark Law, the Anti-Kickback Statute, and the federal False Claims Act. Under the Stark Law and the Anti-Kickback Statute, it is illegal for health care providers and physicians to knowingly accept bribes or other forms of compensation in return for making referrals that result in bills to federal health care programs, such as Medicare, Medicaid, and Tricare. The federal health care regulatory scheme was implemented to protect patients and the Medicare trust fund from corrupt decision-making by health care providers. Likewise, the federal False Claims Act provides a mechanism for private citizens to file lawsuits, on behalf of the government, against entities they believe are defrauding the government.

Whistleblowers under the False Claims Act could be entitled to up to 25 percent of recoveries. The complaint against NBHD, filed by a Fort Lauderdale-based orthopedic surgeon, claimed that NBHD violated the Stark Law by overcompensating its physicians in exchange for the physicians' referrals to its health care facilities. The complaint alleged NBHD kept detailed records of money paid to physicians and amounts generated from the same physicians' referrals by way of "margin reports" and that physicians in deficit were pressured to increase referrals. The physician who filed the NBHD whistleblower suit is reported to have received an estimated \$12 million from the settlement. The first AHS complaint was filed by three former longtime employees of the organization, and alleged that AHS paid improper bonuses to physicians for referring patients to AHS facilities in Florida, North Carolina, Tennessee, and Texas. A second whistleblower suit was filed by a former AHS vice president. Additionally, AHS was accused of using improper coding modifiers for services billed to the Medicare program. These alleged acts, if proven, would constitute violations of the Stark Law and the False Claims Act. The complaints set forth specific examples of alleged violations including that AHS had leased, on behalf of one physician, a BMW and a Mustang and had paid total compensation exceeding \$700,000 to a dermatologist who only worked three days a week. The amount of the whistleblowers' rewards in the AHS settlement have not yet been determined. The

\$118.7 million AHS settlement, announced on September 21, is the largest health care fraud settlement ever made involving physicians' referrals to hospitals. NBHD's settlement, announced on September 15, was a close second at \$69.5 million. **The fact that neither of these cases was litigated seems to suggest the federal government is able to locate "insider" whistleblowers with firsthand information and reliable evidence of fraud.** As would-be whistleblowers become aware of the potential financial upside of rooting out potential fraud in their organizations, there will likely be an uptick in cases brought and settlements made. For hospitals and health care systems, now is the time to ensure compliance programs are functioning at a high level.

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