FLORIDA HEALTH SYSTEM PREVAILS IN REAL ESTATE-RELATED WHISTLEBLOWER ACTION: FIVE KEY TAKEAWAYS

In January of 2014, a relator filed suit against a Florida hospital system ("Health System") under the False Claims Act. We originally reported on the suit against the Health System in this blog post. The suit garnered national attention based on the unique facts of the case.

The suit involved a medical office building that was constructed on the hospital's campus. The Health System engaged a developer to construct and own the medical office building. Instead of selling land on the hospital's campus to the developer, the Health System entered into a ground lease with the developer for the footprint of the medical office building. The Health System simultaneously granted the developer, and the occupants of the medical office building, a non-exclusive easement to use the parking lot on the campus.

Several years later, when the campus was redeveloped, the Health System gave the developer (and the physician occupants of the medical office building) the right to use a parking garage on the campus, which was not contemplated in the original ground lease. For several years, the medical office building also benefited from a property tax exemption.

The relator claimed that the Health System: (1) provided free parking to the physician occupants of the medical office building along with their patients; (2) improperly secured a property tax exemption for the medical office building, which ultimately lowered the rental amounts paid by the physician occupants; and (3) offered physicians valet parking service free of charge.

The relator claimed that by providing access to the parking garage, physician occupants in the medical office building received a benefit from the hospital without compensation for such benefit. In granting summary judgment for the Health System, the court noted that access to the parking garage was provided because some of the parking areas around the medical office building were no longer available when the campus was redeveloped. Moreover, adequate parking for the building and its occupants was a requirement of the local zoning ordinance, and each tenant in the building in fact paid its pro rata share of parking as part of its rental payment. As to the valet parking claim, the court found that the plaintiff failed to show that the physicians or their patients actually used the valet parking services.

The relator also alleged that the Health System provided a rent concession in the form of tax savings by improperly claiming a tax exemption on the medical office building. The court found, to the contrary, that the tenants were required to pay taxes under their leases, and such taxes were in fact collected by the developer landlord. Additionally, after discovering that tax exemption was improperly granted, the Health System made payment of past due taxes.

When ruling on the parties' cross-motions for summary judgment, the court dismissed the relator's claims due to insufficient evidence. More specifically, there was no evidence suggesting that the physician's compensation took into account the volume or value of referrals between the Health System and referring physicians. The plaintiff also failed to introduce any evidence that the rents charged to the physician occupants were inconsistent with fair market value.

The relator who filed the suit against the Health System is the same real estate appraiser who filed a similar suit against a Tennessee hospital for allegedly structuring non-compliant leases with physicians. The Tennessee suit settled for $16.5 million with the relator taking home $2.9 million. More information about the Tennessee suit and the subsequent settlement can be found here and here.

PRACTICAL TAKEAWAYS

1. **Relators are becoming more sophisticated**. In recent years, real estate-related qui tam actions have become more prevalent. In at least two cases, the relators have been real estate professionals. Health care organizations need to be mindful of the greater level of sophistication of these relators. We recommend that health care organizations partner with experienced health care real estate professionals when structuring real estate transactions subject to the Stark Law and the Anti-Kickback Statute.

2. **Hire an expert to establish ground rental rates**. Establishing ground rental rates can be tedious. It has been our experience that only a handful of real estate appraisers around the country have the expertise and market data that is necessary to establish a defensible ground rental rate. The appraiser should take into account the value of the ground leased parcel, along with any parking

rights, building connectors, utilities and other services provided to or made available to the ground leased parcel. A health care organization has a better chance of defending a qui tam action associated with below- or above-market ground rental rates if the health care organization hired an appraiser with expertise in this area to set the initial ground rental rate and carefully documented the rights and benefits associated with the ground leased parcel.

3. **Review property tax exemptions carefully**. Hospital-based property tax exemptions have come under fire from state and local taxing officials around the country. We recommend that hospitals routinely review property tax exemptions to ensure that the hospital continues to qualify for the exemption. We also recommend that hospitals carefully review any property tax exemptions that may benefit physician tenants or other health care providers. If physicians or other health care providers benefit from a hospital-based property tax exemption, it could create a financial benefit that violates the Stark Law and the Anti-Kickback Statute.

4. **Routinely audit real estate arrangements**. One way to avoid costly litigation is to ensure that all leasing arrangements subject to the Stark Law and the Anti-Kickback Statute are routinely audited. The audit should not only focus on the terms of the leases but should also determine whether the scope of the services contemplated under the leases has changed over time. An audit can help to identify a potentially non-compliant arrangement before a government investigation or qui tam action is brought against the health care organization.

5. **Be prepared to defend a whistleblower action**. Preparation is often the key to successfully defending qui tam lawsuits. Health care organizations need to keep good records and document fair market value rents and services offered under leasing arrangements in anticipation of a government investigation or a whistleblower action. Health systems should consider developing a game plan to defend any compliant but high-risk arrangements identified during the audit process.

If you have any questions or would like additional information about this topic, please contact:

- Andrew Dick at (317) 977-1491 or adick@hallrender.com;
- Joel Swider at (317) 429-3638 or jswider@hallrender.com; or
- Your regular Hall Render attorney.