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HEALTH LAW NEWS

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DEFENDANTS SUCCESSFUL IN FCA ACTION ALLEGING DONUTS FOR REFERRALS

Last week, a federal district court in Illinois entered judgment for Defendants in an FCA action against a self-proclaimed "one stop shop" health care referral management company, alleging anti-kickback and FCA violations for its arrangement with a care coordination organization for low-income seniors.[1] Originally filed in 2016, this case highlights how even an FCA case with little factual merit can take years before dismissal.

THE ARRANGEMENT

Management Principals Inc. ("MPI") and Healthcare Consortium of Illinois ("HCI") entered into an 18-month management services agreement under which MPI paid HCI $5,000 a month for advice and counsel based on data it had collected on client eligibility for government programs.

The alleged kickbacks included a controversy surrounding $5-10 Dunkin Donuts gift cards given by an employee of one of MPI's managed organizations to HCI staff members. The employee presented the gift cards to HCI staff on special occasions such as birthdays or showers. The complaint alleged that the gift cards were provided with the expectation of return referrals – an argument the court squarely rejected finding the gifts were *de minimis*.

THE DECISION

The Court entered judgment in favor of the Defendants, acknowledging that while Plaintiff did allege the payments made were kickbacks, it "presented no evidence that the gifts cards or agreement were intended to induce referrals or other illegal or inappropriate kickbacks" or how payments under the services agreement constituted some kind of kickback "beyond pure conjecture."[2] Testimony at the bench trial demonstrated that referrals at HCI were assigned by rotation – not illegitimate preference.

A crucial factor emphasized in the Court's dismissal was the advice of counsel. Notable consideration was given to the Defendants' testimony showing their reliance on the advice of HCI's counsel that the arrangement was perfectly legal. Combined with the fundamental lack by Plaintiff to demonstrate a *quid pro quo*, the Court determined this suggested "there was nothing wrong or illegal about the agreement."

PRACTICAL TAKEAWAYS

Health care providers defending against FCA actions face prolonged litigation in the best scenario. The best defense often comes before a whistleblower files a case when the defendants secure quality advice about the complex regulatory landscape. The Defendants here leveraged that advice into a successful judgment.

This case also highlights a trend recently disfavored by the DOJ: expert whistleblowers. The Plaintiff is in fact a company created for the sole purpose of filing whistleblower lawsuits for profit. In 2018, the DOJ directed its attorneys to consider dismissal of actions that curbed meritless litigation and preserved government resources, such as actions filed by for-profit whistleblowers.[3] Health care entities should remain aware of these whistleblower litigation companies backed by "Wall Street investment bankers"[4] to avoid becoming victim to potentially expensive and meritless litigation and consult with counsel on how early discussions of the nature of a whistleblower can increase the likelihood of dismissal by the government.

If you have any questions or would like more information, please contact:

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[1] *Stop Illinois Health Care Fraud, LLC, Plaintiff, V. Asif Sayeed, Physician Care Services, S.C., Management Principles, Inc., & Vital Home & Healthcare, Inc., Defendants.*, No. 12-CV-09306, 2019 WL 3386964, at *1 (N.D. Ill. July 26, 2019).

[2] *Id*.

[3] Granston Memo.

[4] In 2018, the DOJ moved to dismiss several other cases brought by expert whistleblowers, a copy of the motion can be found here.

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