IMPROPER REAL ESTATE ARRANGEMENTS ALLEGED AS PART OF $72.3 MILLION FCA SETTLEMENT

On July 8, 2020, the Department of Justice announced it settled a *qui tam* action[1] involving alleged violations of the federal and state False Claims Act ("FCA") for $72.3 million against an Oklahoma surgical specialty hospital, its managers, a physician group and two individual physicians. Part of the factual allegations underpinning the FCA claims arose out of real estate arrangements between the hospital and the two physicians that purportedly violated the Stark Law and the Anti-Kickback Statute, in addition to state fraud and abuse laws.

FACTUAL ALLEGATIONS

1. The hospital leased space it did not use in a building owned by the two physicians.

The physicians owned a building across the street from the hospital through an LLC of which the physicians were the only members. The hospital leased a portion of that building for use as an ASC, but when the hospital expanded its surgical space within its own facilities, the complaint claims the hospital no longer needed the leased ASC space. As result, the hospital stated it did not intend to renew the lease. Yet the hospital ultimately agreed to extend the lease twice more, allegedly as a reward for the physicians referring patients to the hospital rather than because the space was reasonable and necessary for the hospital's legitimate business purposes.

2. The hospital provided free office space to one of the physicians for his personal use.

The government's complaint also alleges the hospital gave one of the physicians free office space and equipment for operating and managing the physician's personal business interests and personal affairs for several years. Neither the hospital nor the physician memorialized the arrangement in writing. The complaint claims the hospital gave the physician the use of the free space as a reward for the physician referring patients to the hospital.

SETTLEMENT

The $72.3 million settlement involved significant liability for the hospital, the physician group, and the individual physicians. The hospital, by its management company, will pay the bulk of the settlement amount (approximately $66 million), while the physician group and the two physicians will together pay more than $6 million to the United States and the State of Oklahoma. The requirement that individuals pay part of the settlement is a continuation of the Department of Justice policy intended to deter fraud by imposing liability on the people participating in such schemes. Both the hospital and the physician group also agreed to enter into a five-year Corporate Integrity Agreement to monitor future arrangements between the parties.

PRACTICAL TAKEAWAYS

- Health care executives should be careful what they put in emails, particularly when discussing fair market value and the business purposes for an arrangement. The CFO for the physician group allegedly stated in an email, "FMV for an entity that loses $ should not be hard to determine." On the other hand, creating a positive record for an arrangement's rationale may help bolster the legitimate business purpose of the deal.
- Health care providers should scrutinize and consult legal counsel on any real estate arrangement with a referral entity. Where an arrangement involves referral sources with influence over decision-making, even greater care should be exercised. The complaint at issue alleged that certain individual owners and officers had an outsize influence over whether to enter into the alleged improper leasing arrangements.
- In-house lawyers may not always have an attorney-client relationship with the entity. The *qui tam* relator who brought this case was a lawyer hired by the physician group as an administrator and business manager, and he provided legal representation for some of the defendants involving "discrete matters" that were "completely unrelated" to the allegations in the complaint. When dealing with in-house lawyers who work outside a legal department function, providers should be careful not to assume those lawyers represent the entity by way of an attorney-client relationship.

- Providers should be mindful of state fraud and abuse laws. In addition to the alleged violations of the Stark Law, Anti-Kickback Statute and FCA, the complaint alleged the arrangements at issue also violated state fraud and abuse laws.
- Providers should not get complacent when it comes to health care real estate compliance. The conduct at issue occurred over a several-year period, during which time no compliance action appears to have been brought against the hospital or physician for that conduct. But the lack of a compliance action during the term of an agreement does not mean such a compliance action is not possible in the future. Health care providers should be proactive to consider the compliance implications of each of their leases with referral entities.
- The government will continue to target individuals, as well as institutions, in its FCA enforcement and settlement.
- The parties settled before the disposition of the factual claims in the case, so it is unclear if these factual allegations had merit. Even so, providers can learn from the behavior at issue to reduce the likelihood of any meritorious *qui tam* actions in the future.

If you have any questions or would like more information on health care real estate compliance matters, please contact:

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Special thanks to Aisha Williams and JD French for their assistance with preparing this article.

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[1] United States ex rel. Allison v. Southwest Orthopaedic Specialists, PLLC, et al., No. CIV-16-569 (W.D. Okla.).

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