

## REAL ESTATE PROFESSIONALS CAN BE WHISTLE BLOWERS TOO!

A trend in real estate-related False Claims Act litigation should put hospitals and other health care providers on notice that relators are looking for big paydays for non-compliant real estate arrangements. The relators described in this article are real estate professionals who are bringing technically complex claims with little to no institutional knowledge of the hospital's operations. In many instances, the relators' claims appear to be tenuous and the government has declined to intervene on behalf of the relator. Nevertheless, hospitals often elect to settle the claims for millions of dollars. By settling, the hospital avoids expensive False Claims Act litigation and the uncertainty of a trial on the merits. In this post, we have summarized claims recently filed by two such relators under the False Claims Act against hospital systems.

### REAL ESTATE APPRAISER - THE BINGHAM CASE

In January 2014, a relator with no apparent inside information filed suit under the False Claims Act against a Florida hospital for allegedly structuring non-compliant real estate arrangements. Information about the hospital's motion to dismiss the complaint can be found [here](#). The relator is a real estate appraiser based out of Nashville, Tennessee. In 2012, the same relator benefitted from a multi-million dollar payout for blowing the whistle on a Chattanooga, Tennessee hospital for an alleged non-compliant real estate arrangement under Stark. More information about the settlement of that case can be found [here](#).

In the 2014 Florida case, the relator alleged that the hospital provided remuneration to physicians leasing space in a medical office building by granting the building owner a non-exclusive parking easement on the hospital's campus. According to the relator, the ground lessee ground leased space on the hospital's campus for the development of the medical office building. At the same time, the ground lessee secured the right to use various surface parking areas on the hospital campus. Several years later, when the campus was redeveloped, the hospital granted the ground lessee (and its occupants) the right to use a parking garage on the campus that was not contemplated in the original ground lease. The relator claimed that by providing access to the parking garage, physician-tenants in the building received a benefit from the hospital without compensating the hospital for such benefit. The relator did not bother to mention the fact that access to the parking garage was provided because some of the parking areas provided in the original ground lease were no longer available when the campus was redeveloped. It should also be noted that adequate parking for the building and its occupants was a requirement of the local zoning ordinance.

The relator also alleged that the hospital violated the Stark and anti-kickback laws by extending indirect rent concessions to the ground lessee by securing a property tax exemption on the ground leased real estate. The relator alleged that because the hospital obtained the exemption, the ground lessee was able to provide lower effective rental rates to physician-tenants of the building, and some of those physicians referred patients to the hospital.

Despite the relator's tenuous claims and the government declining to intervene in the case on behalf of the relator, the case survived the hospital's Rule 9(b) motion to dismiss.

### REAL ESTATE DEVELOPER - THE OSHERHOFF CASE

In another case that was recently decided, a real estate developer brought suit under the False Claims Act against a Florida health clinic. In the complaint, the relator alleged that he could not develop and operate a profitable medical clinic in the Miami area because the defendant health clinic provided free services to patients in violation of the Anti-Kickback Statute. The Eleventh Circuit Court upheld the trial court's dismissal of the case on procedural grounds and did not get to the merits of the relator's claims. Information about the case can be found [here](#). The relator is the same individual that benefitted from a December 2013 settlement of approximately four million dollars with a different Florida hospital system for alleged Stark and anti-kickback-related real estate compliance issues. Information about the settlement can be found [here](#).

In the case that settled in December 2013, the relator owned a medical office building ("MOB") on a hospital campus in Florida and had difficulty leasing space in the MOB. The relator learned that a hospital-owned MOB that was adjacent to and substantially similar to his MOB had a higher occupancy rate. As a prospective purchaser of a portfolio of real estate owned by the hospital throughout the southeast, the relator was privy to detailed information (i.e., "comparables") related to leases the hospital and its affiliates entered into with physician-

tenants, including leases for space in the hospital-owned MOB. Among the information the relator obtained were reports from consultants engaged by the hospital to confirm the square footage of the real estate portfolio. In some cases, the consultant's measurements were inconsistent with the measurements set forth in the leases that the hospital and its affiliates had entered into with physician-tenants. The relator ultimately alleged that the hospital and its affiliates misrepresented the size of the space that it leased to physician-tenants, which resulted in below market rents in violation of the Stark Law.

Despite the fact that multiple states declined to intervene in the case on behalf of the relator, the hospital settled the case with the relator. The settlement agreement acknowledges that one of the reasons for settling the case was to avoid the uncertainty and expense of False Claims Act litigation.

## **PRACTICAL TAKEAWAYS**

Structuring real estate transactions between hospitals and health care providers invokes compliance concerns and can be complex. Hospitals and health care providers should carefully scrutinize all aspects of their real estate arrangements to avoid the snares of relators with specialized or inside knowledge looking for their next pay day. Providers should look to health care real estate compliance counsel to assist with the following:

- Complex leasing arrangements, including ground leases
- Development agreements
- Areas of perceived benefit to providers
- Determining whether to share lease-related information with third parties
- Determining whether to place lease-related information of record through the recording of easements and memoranda of leases
- Securing property tax exemptions that may benefit referral sources

For more information about this topic, please contact:

- Andrew Dick at (317) 977-1491 or at [adick@hallrender.com](mailto:adick@hallrender.com);
- Robert A. Hicks at (317) 977-1433 or at [rhicks@hallrender.com](mailto:rhicks@hallrender.com); or
- Your regular Hall Render attorney.