All Children's Health *Qui Tam* Case Is Latest Attack on Hospital Growth Practices

By Timothy M. Moore, Esq., Miami, FL*

The All Children's Health *qui tam* case is the latest symptom of the increasing and feverish zeal by *qui tam* claimants for alleging wrongdoing under the False Claims Act in connection with government healthcare.[1]

In August 2012, the United States District Court for the Middle District of Florida unsealed a whistleblower lawsuit by an All Children's Health former employee, Barbara Schubert. Ms. Schubert, the *qui tam* relator, brought her suit under the federal False Claims Act as well as the Florida False Claims Act, authorizing private individuals to sue in the name of the federal and Florida governments for violations thereof.[2] The complaint alleges that All Children's Health compensated doctors it hired at above the market rate to induce those doctors to refer patients and services to All Children's Hospital, which in turn would bill Medicare for the treatment rendered. This case is proceeding without the United States, which noticed the court on July 26, 2012, that it would not be intervening at that time.[3]

This case does more than signal the continually rising tide of cases critical of how hospitals compensate physicians. It shines light on the difficulty healthcare providers face creating fair employment relationships with doctors while also making profitable business decisions.[4]

I. The Stark Law, Anti-Kickback Statute, and False Claims Act: The Plaintiff's Ensemble for Sounding the Cause of Action in This Medicaid *Qui Tam* Case

The plaintiff, in pleading her case, invokes four separate laws: the Stark law, the Anti-Kickback Statute, the federal False Claims Act, and the Florida False Claims Act.

A. The Federal Stark and Anti-Kickback Statutes Regulate Physician-Entity Relationships and Referrals but Create No Private Right of Action

The federal Stark law restricts the relationships between physicians and healthcare providers. A physician cannot refer a patient to an entity with which the physician has a financial relationship, as defined in the Stark law.[5] In turn, a healthcare entity cannot present, or cause to be presented, a claim for healthcare services it rendered due to a referral prohibited by the Stark law.[6] The Stark statute and regulations define "financial relationship" as (1) an ownership or investment interest or (2) a compensation arrangement with the entity.[7]

Unlike the Stark law, which focuses on the relationship between the referring physician and the healthcare entity receiving the referral, the federal Anti-Kickback Statute targets the referral transaction. Generally, it prohibits the payment or solicitation of "remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind" in exchange for referring someone to a person for providing, or arranging for the providing, of services or items paid by a federal healthcare program.[8]

However, "[i]n recognition of the fact that legitimate relationships may exist between hospitals and physicians who practice in or refer patients to hospitals, exceptions . . . were included in both the Anti–Kickback Statute and the Stark Statute."[9] The Stark and Anti-Kickback Statutes, and the federal regulations implementing those statutes, prescribe the necessary requirements to submit a claim to the government when those statutes would ordinarily bar that claim.[10]

B. The Federal and Florida False Claims Acts Provide the Private Right of Action Based on Falsely Certifying Compliance With the Stark and Anti-Kickback Statutes

Although neither the Stark nor the Anti-Kickback Statutes provide for a private cause of action, they can form the foundation for a claim under the federal False Claims Act, which does create a private right of action, and thus is a means by which the relator has been able to bring her *qui tam* case against All Children's Health. The federal False Claims Act, which dates back to the Civil War, prohibits (1) knowingly presenting, or causing to be presented, to the government a false or fraudulent claim for payment or approval; or (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim.[11]

Yet, the mere violation of the Stark or Anti-Kickback Statutes does not create liability under the federal False Claims Act.[12] Instead, it is the false certification of compliance with the "Stark or Anti-Kickback Acts in connection with a claim submitted to a federally funded insurance program" that furnishes the basis for a False Claims Act suit.[13] For example, the False Claims Act makes illegal a healthcare provider (1) falsely certifying compliance with the Stark and Anti-Kickback Statutes when submitting a claim directly to the federal government or (2) causing a state to submit false claims to the federal government for services provided due to prohibited referrals.[14]

Similarly, the Florida False Claims Act provides a private cause of action for those who have evidence of someone (1) knowingly presenting, or causing to be presented, to a state agency a false or fraudulent claim for payment or approval; or (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim.[15] Also, like the federal False Claims Act, the Florida counterpart is violated through a false certification of compliance with the Stark and Anti-Kickback Statutes, not through merely violating those statutes. Accordingly, conduct similar to that which is actionable under the federal False Claims Act, if it involved presenting or making false claims or statements to a state agency, is likely to provide a basis for a suit under the Florida False Claims Act.

II. The Alleged Facts in the All Children's Health Case: Allegations of Volume-Based and Unjustifiably High Compensation as Inducement for Referrals

The plaintiff has sued several related defendants in this case: All Children's Health System, Inc. ("ACHS"), Pediatric Physician Services, Inc. ("PPS"), and All Children's Hospital, Inc. ("ACHI"). ACHS is "a Florida corporation that owns and operates All Children's Hospital ("ACH"), a specialty children's hospital predominantly serving the west central Florida community."[16] ACHS uses several other corporations to run ACH. For

continued, next page

example, ACHS uses ACHI, a wholly owned subsidiary, for the management and daily operations of ACH.[17] Among other things, ACHI "is responsible for... making claims and receiving payment for services rendered pursuant to government healthcare coverage."[18] PPS, another ACHS subsidiary company, manages physician staffing for ACH and "is responsible for implementing the strategy of physician recruitment and practice acquisition, and for providing administrative oversight of employee-physicians."[19]

The plaintiff worked for PPS from 1998 through 2011 as its Director of Operations.[20] In that role, the plaintiff reported directly to an executive at ACHS who allegedly negotiated the compensation arrangements the plaintiff claims were unlawful.[21] According to the plaintiff, that executive concluded that ACHS could best shore up its allegedly dwindling market share by "employ[ing] as many physicians as possible to guarantee their loyalty, and therefore their referrals, to ACH."[22]

In the complaint, the plaintiff identifies two financial arrangements that ACHS allegedly used to recruit doctors and, so the plaintiff argues, induce the doctors to refer cases to ACH:

(1) Volume-based compensation of doctors hired: The plaintiff alleges that the defendants "offered a volume-based incentive bonus to four neurosurgeons if the practice group as a whole could maintain the volume of procedures that six neurosurgeons had completed the year prior, so long as the procedures were conducted at ACH."[23] The plaintiff also identifies one employment agreement whereby a surgeon's base salary and bonus were predicated upon him performing a minimum number of surgeries during one year, with the agreement that the surgeon and the defendants may revisit his yearly salary and bonus based upon the number of surgeries he performed.[24]

(2) Compensating hired doctors above market value: The plaintiff, as PPS's Director of Operations, developed a compensation and bonus incentive plan for new doctors.[25] The plaintiff alleges several examples of compensation beyond what she determined was the 75th percentile of the fair market value for the doctors' services:

(A) PPS added new emergency room physicians with a base salary of at least approximately $70,000 over the compensation rate at the 75th percentile, two of whom had no post-fellowship experience;[26]

(B) PPS bought a pediatric hematology/oncology practice at its highest estimated value, as determined by an outside valuation company, and agreed to pay its owner a salary that was $90,000 above the highest salary reported in the considered compensation surveys;[27]

(C) PPS hired a pediatric surgeon with a base salary "nearly $200,000 more than the median fair market value salary for a pediatric general surgeon of his experience, and $80,000 more than the 90th percentile";[28] and

(D) PPS used "side letters" guaranteeing physicians additional compensation or benefits that were not part of PPS's main employment agreement with the physicians, such as tail coverage, indemnification in defending in a non-compete suit, and employment for spouses.[29]

Ultimately, the plaintiff claims that the volume-based and over market-value compensation arrangements violated the Stark and Anti-Kickback laws because the defendants offered the compensation intending to induce the recipient doctors to refer cases to ACH.[30] Furthermore, the plaintiff alleges that those violations of the Stark and Anti-Kickback Statutes made false Stark and Anti-Kickback Statute compliance certifications, which accompanied each claim ACHS submitted to the federal and Florida governments for services referred by those physicians.[31]

III. Early Lessons From the All Children's Health Qui Tam Case: Knowledgeable Counsel May Help the Qui Tam Bull Avoid Seeing the Red Flag of Paying Over Fair Market Value for Physician Services

The All Children's Health case is in its early stages. Consequently, much remains to be seen. For example, will the financial arrangements be defensible under the "bona-fide employment relationship" exceptions to the Stark and Anti-Kickback Statutes?[32] The plaintiff in this case explicitly raises this possibility, but implicitly argues that the exception does not apply.[33] Whether the exception applies may depend upon, among other things, the defense evidence that the compensation agreements were in fact "consistent with the fair market value of the services" and were "commercially reasonable."[34]

Even still, the immediate teaching point the All Children's Health case offers is that paying hospital staff above market rate may be a glaring signal for a *qui tam* claimant. A *qui tam* plaintiff does not need to rely upon an explicit agreement between the healthcare provider and the doctor for referrals in violation of the Stark or Anti-Kickback Statutes. Instead, the *qui tam* plaintiff, such as the one in the All Children's Health case, will argue that compensation outside of the prevailing market rate has no other purpose than to induce referrals, and thus inferentially proves Stark and Anti-Kickback Statute violations. In fact, *qui tam* plaintiffs' successes with this theory are recent and recurring, as evidenced by the multi-million dollar settlements in *qui tam* cases such as those involving St. Joseph Medical Center and HCA Inc.[35] The resulting question: How does a healthcare provider balance the tension between the legitimate business decision to pay top dollar for top talent and making sure that compensation arrangements do not violate the Stark and Anti-Kickback Statutes?

The answer to that question is for the healthcare provider to have knowledgeable counsel who can work towards preventing, or minimizing, the impact of *qui tam* litigation. Specifically, knowledgeable counsel can, reduce future compliance costs by evaluating whether past or current transactions may be subject to a claim that they violated the Stark or Anti-Kickback Statutes. If either is the case, then knowledgeable counsel will be able to identify the best solution for solving potential legal issues before the *qui tam* plaintiff files suit.

Thus, counsel can help diminish future risk by structuring future transactions to comply with the Stark and Anti-Kickback Statutes. Additionally, counsel may devise strategies for defending appropriate business decisions that a *qui tam* claimant may question by lawsuit. For example, counsel may suggest that a healthcare provider obtain independent valuations of practices before purchasing them, reasoning that having evidence supporting the soundness of the healthcare provider's business decision when that decision is made is better than having to rely on an after the fact justification.

continued, next page

QUI TAM CASE

from previous page

Endnotes

* **Timothy M. Moore**, a former federal and state prosecutor, focuses on the defense of companies and executives as an associate in Shook, Hardy & Bacon's Government Enforcement and Compliance Practice Group. He can be contacted at 305-358-5171 or by e-mail at tmoore@shb.com. For more information, see http://www.shb.com/attorney_detail.aspx?id=1091 or http://www.linkedin.com/in/timothymmoore1.

1 *United States of America and State of Florida ex rel. Barbara Schubert v. All Children's Health System, Inc. et al.*, Case No. 8:11-CV-1687 (hereinafter "*Schubert*").

2 31 U.S.C. § 3730(b); § 68.083(2), Fla. Stat.

3 *Schubert*, Notice of the United States That It is Not Intervening at This Time, July 26, 2012 (Docket Entry # 3).

4 When this article went to press, discovery had not commenced and the defendants had not filed an answer. Furthermore, the plaintiff's motion for leave to file their proposed Third Amended Complaint was pending before the court. Accordingly, this article presents only the allegations in the plaintiff's Second Amended Complaint and proposed Third Amended Complaint.

5 42 U.S.C. § 1395nn(a)(1).

6 *Id.*

7 § 1395nn(a)(2)

8 42 U.S.C. § 1320a-7b(b)(2).

9 *United States ex rel. Wilson v. Crestwood Healthcare, L.P.*, Case No. CV-11-S-3361-NW, 2012 WL 1886351, at *5 (N.D. Ala. May 18, 2012).

10 *See, e.g.*, 42 U.S.C. §§ 1320a–7b(b)(3) (containing exceptions to the Anti-Kickback Statute), 1395nn(b)-(e) (listing statutory exceptions to the Stark Statute); 42 C.F.R. §§ 411.350-.357 (providing regulatory exceptions to the Stark Statute), § 1001.952 (creating exceptions to Anti–Kickback Statute).

11 31 U.S.C. § 3729(a)(1)(A)-(B); *United States v. Halifax Hosp. Med. Ctr.*, Case No. 6:09-cv-1002-Orl-31DAB, 2012 WL 921147, at *4 (M.D. Fla. Mar. 19, 2012).

12 *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, Case No. 2:11-cv-89-FtM-29DNF, 2012 WL 523623, at *4 (M.D. Fla. Feb. 16 2012) (citing *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)).

13 *Halifax Hosp.*, 2012 WL 921147, at *3; *Mastej*, 2012 WL 523623, at *4.

14 *Halifax Hosp.*, 2012 WL 921147, at *4.

15 §§ 68.081-.089, Fla. Stat. One federal court observed that Florida's False Claims Act "mirrors the federal statute nearly verbatim. *Eve Barys and Dwayne Ostrom ex rel. United States v. Vitas Healthcare Corp.*, Case No. 04-21431-CIV, 2007 WL 2310862, at *1 n.1 (S.D. Fla. July 25, 2007).

16 *Schubert*, Second Am. Compl. 9 (Docket Entry # 2).

17 *Id.* 11.

18 *Id.*

19 *Id.* 10.

20 *Id.* 8; *Schubert*, Third Am. Compl. 11 (Docket Entry # 21).

21 *Id.*

22 *Id.* 30-31; Second Am. Compl. 20-31.

23 Third Am. Compl. 62-69.

24 *Id.* 51-55.

25 Second Am. Compl. 33.

26 Third Am. Compl. 37-41.

27 *Id.* 42-47.

28 *Id.* 48-50.

29 Second Am. Compl. 38.

30 *Id.* 45-62; Third Am. Compl. 6, 80-116.

31 *Id.* 6, 80-116; Second Am. Compl. 45-62.

32 42 U.S.C. §§ 1395nn(e)(2) (containing the bona-fide employment exception to the Stark Statute), 1320a-7(b)(3)(B) (containing the bona-fide employment exception to the Anti-Kickback Statute).

33 Second Am. Compl. 2, 23.

34 42 U.S.C. § 1395nn(e)(2)(B), (C).

35 Press Release, Dep't of Justice, St. Joseph Medical Center in Maryland to Pay U.S. $22 Million to Resolve False Claims Act Allegations (Nov. 9, 2010); Press Release, Dep't of Justice, Hospital Chain HCA Inc. Pays $16.5 Million to Settle False Claims Act Allegations Regarding Chattanooga, Tenn., Hospital (Sept. 19, 2012).