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FEDERAL COURT DISMISSES QUI TAM ACTION ALLEGING STARK II AND ANTI-KICKBACK VIOLATIONS

In a decision of great import to Medicare providers and practitioners, a federal district court in Michigan has jerked back on the reins of the United States and private whistle blowers who attempt to bring actions under the federal False Claims Act¹ ("FCA") alleging violations of Stark II² and the Federal Anti-Kickback Statute³.

On February 14, 2002, the U.S. District Court for the Eastern District of Michigan dismissed in its entirety a qui tam FCA lawsuit⁴ in which the United States had intervened, which alleged that McLaren Regional Medical Center ("McLaren") had entered into an office lease with Family Orthopedic Realty, L.L.C. ("FOR"), which provided for rental payments the government alleged to exceed fair market value. FOR was owned by five orthopedic surgeons who referred patients for physical therapy (and presumably for hospital inpatient and other outpatient services) to McLaren.

The building in question was owned by FOR, and McLaren's intention was to lease one whole floor of the building in which to operate a large orthopedic center. The United States named not only McLaren and FOR, but also the individual orthopedists as defendants in the case.

The Underlying "Scheme"

The government alleged that the lease between McLaren and FOR merely disguised an improper financial and referral relationship among the parties, which violated both Stark II and the Federal Anti-Kickback Statute, tainting referrals of government program patients by the defendant physicians to McLaren, as well as the referrals of government program patients resulting from those referrals.

The parties agreed that the issue of fair market value was potentially determinative of the case, especially if the court concluded the lease payments were, in fact, consistent with FMV. The court agreed to conduct a separate bench trial on this issue.

For an entire week, government and defense experts argued strenuously over the range of reasonableness, comparability of leases, even whether properties on one side of the street should be analyzed, but not those on the other. Other defense witnesses, including FOR's attorney who negotiated the lease, testified concerning the sometimes torturous 9-month negotiation process (fortunately memorialized in writing in large part).

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At the conclusion of the evidence, the court concluded that McLaren's and FOR's experts were more persuasive. In dismissing the action, the court concluded that (1) the lease was an arm's length transaction, (2) the lease payments were consistent with fair market value, and (3) the government introduced no evidence that the lease rate was determined in a manner that took into account the volume or value of potential patient referrals. The court rejected the government's arguments that "non-compete" and "exclusivity" provisions in the lease were evidence that the lease rate took patient referrals into account.

What Does McLaren Tell Us?

First, kudos to McLaren, FOR and the individual defendants for the strength of their convictions in taking this case to trial. Most FCA defendants do not, and that is understandable given the draconian penalties a court must impose on a judgment defendant under the FCA.

The government counts on this reluctance, and uses its leverage most effectively in both pre- and post- intervention negotiations. That is why most cases settle, possibly even some that should not. As the court's exhaustive discussion of the respective experts' testimony indicates, the United States' case is not always as strong as it would lead defendants to believe during the "jawboning" phase.

Second, if ever there was a decision that answers the question: "Why are we doing all this compliance stuff?", *McLaren* is it. McLaren had done its homework before and during the negotiation stage of the transaction. The court attached great significance to the obvious, documented arms-length nature of the negotiations and resulting lease.

Finally, one has to ask why on earth the United States of America intervened in this case. Not only was this not the kind of open-and-shut case the government prefers, it was one they could easily lose. Which they did. It was also one which could produce a troublesome precedent for the government. Which it did. And the government

is appealing the decision, which, in the writer's opinion can only be calculated to result in another setback at the Court of Appeals level.

Still, consider the collateral damage. This case was pending and under investigation for over three years before the United States intervened, and for yet another year before the fair market value issue went to trial. The defendants had to have spent several hundreds of thousands of dollars and thousands of extremely stressful man-hours defending themselves, before ultimately prevailing.

They "took one for the team," for which they deserve the industry's congratulations and gratitude. • BC

(1) 31 U.S.C. §3729 *et seq.*

(2) 42 U.S.C. §1395mm

(3) 42 U.S.C. §1320a-7b(b)

(4) *United States of America, ex rel., Peter Goodstein and Charles Grossman, Plaintiffs v. McLaren Regional Medical Center, Family Orthopedic Realty, L.L.C., Norman Walter, M.D., Stephen Burton, M.D., Larry Pack, M.D., Nathaniel Norten, M.D. and Arun Bass, M.D., Defendants, Case No. 97-CV-72992-DT, USDC E.D., Mich., February 14, 2002, CCH Healthcare Compliance Daily Document Update ¶105,061*