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Appraiser Files Multiple Qui Tam Suits Against Health Systems

Healthcare entities are increasingly facing lawsuits alleging healthcare fraud and abuse violations that are filed by private citizens (known as *qui tam* relators) under the federal *False Claims Act* (FCA).[1] As discussed in the April 2015 Health Capital Topics article entitled, "*False Claims Act: FY 2014 in Review*," more than half of the $5.69 billion recovered by the *U.S. Department of Justice* (DOJ) under the FCA stemmed from actions instituted by *qui tam* relators.[2] In recent years, the trend toward an increased volume of *qui tam* actions in healthcare fraud and abuse cases has manifested with an unlikely source of potential *qui tam* relators – professional appraisers. Specifically, a commercial real estate appraiser from Tennessee has filed two *qui tam* suits under the FCA against his clients, alleging violations of the *Stark Law* and *Anti-Kickback Statute*.[3] In the first case, *U.S. and State of Florida ex rel. Bingham v. HCA, Inc.* (HCA case), the U.S. District Court for the Southern District of Florida is considering whether or not to dismiss the case on motion from the Defendant, HCA, Inc.[4] In the second case, *U.S. and State of Florida ex rel. Bingham v. BayCare Health System* (BayCare case), the U.S. District Court for the Middle District of Florida upheld the validity of the lawsuit, holding that the relator alleged sufficiently detailed facts in his complaint to merit continued adjudication.[5]

This Health Capital Topics article will first discuss the facts and circumstances of the two lawsuits, the allegations contained therein, and the potential impacts of the cases on FCA litigation in the future. In addition, this article will discuss the possible ethical implications of appraisers filing *qui tam* lawsuits against their clients, as well as the potential manner in which *qui tam* lawsuits may impact the relationship between an appraiser and their client.

Both lawsuits allege similar facts, namely, the use of undervalued lease agreements, development contracts to construct medical office buildings, and parking easements between the hospital operator and a development company; these benefits are then transferred to the referring physicians who ultimately occupy the buildings. In the HCA case, the relator alleged that *Hospital Corporation of America* (HCA) passed inducements to referring physicians by "*laundering*" funds for lease payments through third-party owners of newly constructed medical office buildings to referring physicians who occupied the medical office buildings.[6] Specifically, the relator alleged that HCA provided the following remuneration to referring physicians in order to induce referrals:

(1) "*Grossly undervalued long-term ground leases of undeveloped hospital campus properties*" from HCA to third-party developers, with a lease term of 99 years;[7]
(2) "*Overly generous long-term easements and parking rights*" from HCA to the owners and tenants of newly constructed medical office buildings near HCA hospitals;[8]
(3) "*Rent for space in the medical office buildings that HCA had no intention to use*" as cover for the third-party developers before physicians occupied the buildings;[9] and,
(4) Lease provisions, which were mandated by HCA, between the third-party developer and the physician tenants "*that provided certain benefits for physician-tenants*,"[10] such as "*pro-rata portions from the property's operating cash flow*."[11]

The complaint alleges that these relationships and the resulting payments, which occurred in both Independence, Missouri, and Aventura, Florida,[12] violate both the *Stark Law* and the *Anti-Kickback Statute*, and, when coupled with the submission of claims to the federal government for reimbursement, can serve as grounds for bringing a *qui tam* suit under the FCA.[13]

The relator alleged similar accusations in the BayCare case, which centered on the BayCare Health System-owned St. Anthony's Hospital. According to an order by Judge Steven D. Merryday of the U.S. District Court for the Middle District of Florida, the relator alleged BayCare violated the Stark Law, Anti-Kickback Statute, and FCA through the following actions:

> "*The alleged scheme in this qui tam action involves construction of medical office buildings, common areas, walkways and garages on the St. Anthony's Hospital campus, and the leasing arrangements between BayCare proxies (the Developer/Landlord) and the referring physicians occupying the medical office buildings*." [14]

In this scheme, the relator alleged that the financial benefits of the transaction transferred from BayCare to

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the Developer, who then transferred the benefits to the referring physicians *"to encourage [the physicians] to make or increase referrals*."[15] The specific remuneration at issue included the following:

(1) A "*non-exclusive parking easement*" from BayCare to the Developer of the medical office building, which was later amended to allow referring physician parking;[16]
(2) "*[A] rent concession to the referring physicians*" with offices at the medical office buildings by "*claiming a tax exemption for non-exempt property*;"[17] and,
(3) "*Valet services*" on the campus of St. Anthony's Hospital.[18]

Currently, both cases are pending in their respective Florida district courts. In the HCA case, the defendant HCA filed a motion to dismiss in the U.S. District Court for the South District of Florida on August 17, 2015.[19] The court has not yet ruled on HCA's Motion to Dismiss, but the court has scheduled a mediation conference for April 12, 2016 in hopes of settling the case.[20] In the BayCare case, the U.S. District Court for the Middle District of Florida denied BayCare's Motion to Dismiss on August 14, 2015, ruling that the relator provided "*some indicia of reliability*" to support the allegation that false claims for reimbursement were filed by HCA even though the complaint does not identify a single, specific false claim for reimbursement.[21]

While the two cases described above have distinct legal nuances, particularly because the relator did not allege any specific claims that were falsely billed to the federal government,[22] both cases pose numerous questions regarding the role of an appraiser in an appraiser-client relationship. Under the *Uniform Standards of Professional Appraisal Practice* (USPAP), an appraiser "*must not disclose: (1) confidential information; or (2) assignment results to anyone other than:*

(1) *The client;*
(2) *Persons specifically authorized by the client;*
(3) *State appraiser regulatory agencies;*
(4) *Third parties as may be authorized by due process of law; or,*
(5) *A duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law…*"[23]

Similarly, under Canon 4 of the *Code of Professional Ethics* for the *Appraisal Institute*, "*It is unethical to disclose confidential information or an analysis, opinion, or conclusion specific to a Service to anyone other than:*

(a) The client and those persons specifically authorized by the client;
(b) Third parties, when and to the extent that there is a legal obligation to do so by statute, ordinance, or court or regulatory order;
(c) Legal counsel, as reasonably necessary in the event of actual or threatened legal or regulatory action;
(d) Authorized insurance representatives, for the purpose of seeking or maintaining professional liability insurance coverage; and
(e) The duly authorized Investigators and peer review or admissions committees of the Appraisal Institute."[24]

An appraiser disclosing confidential information, not at the behest of an official inquiry, with the potential to receive financial gain as a *qui tam* relator presents a potential challenge to the appraiser's duty of confidentiality under professional ethical standards, such as USPAP and the canons of the *Appraisal Institute*. Unauthorized disclosures may cause irreparable harm to the reputation of the appraiser and, if applicable, their employer. For example, one recent website posting from the law firm *McDermott Will & Emery* labeled the relator as a "*serial whistleblower*," which can serve to stigmatize a business and alert potential clients of this reputation.[25] Further, if the appraiser signed confidentiality or nondisclosure agreements with the client that is subject to the unauthorized disclosure, the client may be able to explore possible legal remedies for breach of contract.

In a broader sense, the industry-wide impact of appraisers-turned-*qui tam* relators may damage the delicate trust between third party appraisers and their clients, encouraging health systems to be guarded in the information and data provided to an appraiser. Any impediments to the free flow of information between the client and the appraiser may jeopardize the efficacy and validity of the appraiser's opinion.

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1 "Civil Actions for False Claims" 31 U.S.C. 3730(b) (2012).
2 "Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014" Office of Public Affairs, U.S. Department of Justice, November 20, 2014, http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014 (Accessed 9/10/15); "False Claims Act: FY 2014 in Review" Health Capital Topics, April 2015, p. 2.
3 "U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc." Case No. 1:13cv23671-MGC (S.D. Fla., Aug. 15, 2014), First Amended Complaint, p. 4; "U.S. and State of Florida ex rel. Thomas Bingham v. BayCare Health System" Case No. 8:14-cv-73-T-23EAJ (M.D. Fla., Aug. 14, 2015), Order on Defendant's Motion to Dismiss, p. 5-6.
4 "U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc." Case No. 1:13cv23671-MGC (S.D. Fla., September 2, 2015), Civil Docket.
5 "U.S. and State of Florida ex rel. Thomas Bingham v. BayCare Health System" Case No. 8:14-cv-73-T-23EAJ (M.D. Fla., Aug. 14, 2015), Order on Defendant's Motion to Dismiss, p. 14; "U.S. Court in Florida Refuses to Dismiss FCA Claims by Relator with No Relationship to Defendants" AHLA Weekly, American Health Lawyers Association, 8/21/15, https://www.healthlawyers.org/News/Health%20Lawyers%20Weekly/Pages/2015/August%202015/August%2021%202015/U-S--Court-in-Florida-Refuses-to-Dismiss-FCA-Claims-By-Relator-With-No-Relationship-to-Defendants-.aspx (Accessed 8/27/15).
6 "U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc." Case No. 1:13cv23671-MGC (S.D. Fla., Aug. 15, 2014), First Amended Complaint, p. 4.
7 *Ibid*, p. 5.
8 *Ibid*.
9 *Ibid*.

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10 *Ibid*.
11 *Ibid*, p. 15.
12 *Ibid*, p. 4.
13 *Ibid*.
14 "U.S. and State of Florida ex rel. Thomas Bingham v. BayCare Health System" Case No. 8:14-cv-73-T-23EAJ (M.D. Fla., Aug. 14, 2015), Order on Defendant's Motion to Dismiss, p. 5.
15 *Ibid*, p. 5-6.
16 *Ibid*.
17 *Ibid*, p. 6.
18 *Ibid*.
19 "U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc." Case No. 1:13cv23671-MGC (S.D. Fla., September 2, 2015), Civil Docket.
20 *Ibid*.
21 "U.S. and State of Florida ex rel. Thomas Bingham v. BayCare Health System" Case No. 8:14-cv-73-T-23EAJ (M.D. Fla., Aug. 14, 2015), Order on Defendant's Motion to Dismiss, p. 10; AHLA Weekly, 8/21/15.
22 AHLA Weekly, 8/21/15.
23 "Uniform Standards of Professional Appraisal Practice: 2014-2015" Appraisal Standards Board, The Appraisal Foundation, Washington, D.C.: The Appraisal Foundation, 2014, p. U-9.
24 "Code of Professional Ethics of the Appraisal Institute" Appraisal Institute, January 1, 2015, http://www.appraisalinstitute.org/assets/1/29/CPE__w_explanatory_comments_effect_01-01-15.pdf (Accessed 9/10/15).
25 "Can Satisfying a Regulatory Requirement Now Equate to Providing Illegal Remuneration?" By Tony Maida and T. Reed Stevens, McDermott Will & Emery, September 9, 2015, http://www.fcaupdate.com/2015/09/can-satisfying-a-regulatory-requirement-now-equate-to-providing-illegal-remuneration/ (Accessed 9/10/15).

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