

U.S. Intervenes in False Claims Act Case Against Hospital

On April 11, 2022, the U.S. Department of Justice (DOJ) intervened in an ongoing lawsuit against Methodist Le Bonheur Healthcare (Methodist). The lawsuit was originally filed in 2017 by two relators, a former Methodist executive leadership team member and the former CEO for Methodist University Hospital.¹ The crux of the relators' complaint was that Methodist induced the referrals of cancer patients to their facility through kickback payments made to The West Clinic (West), in violation of fraud and abuse laws.²

Methodist is a non-profit healthcare system consisting of five hospitals as well as outpatient and ancillary services.³ West (also known as West Cancer Center) is a large oncology physician group with several outpatient oncology clinic locations in Tennessee, Mississippi, and Arkansas.⁴ The lawsuit alleges that during the partnership between Methodist and West (2012 to 2018), over \$400 million was allegedly paid by Methodist for referrals from West physicians in the form of kickbacks, "disguised thorough a sophisticated business integration."⁵ Through the alleged illegal inducement of referrals from West physicians, Methodist received over \$1.5 billion in increased revenues,⁶ with over half of these increased revenues estimated to have been paid by Medicare and Medicaid.⁷

The Anti-Kickback Statute (AKS) makes it a felony for any person to "knowingly and willfully" solicit or receive, or to offer or pay, any "remuneration," directly or indirectly, in exchange for the referral of a patient for a healthcare service paid for by a federal healthcare program.⁸ Similar to the Stark Law, the AKS contains several safe harbors, including protections for personal services and management contracts, which may shield an arrangement from regulatory liability if some or all of the requisite criteria is met.⁹ Failure to meet all of the requirements of a safe harbor does not necessarily render an arrangement illegal.¹⁰ However, for a payment to meet the requirements of many AKS safe harbors, the compensation must: (1) be consistent with FMV; (2) be commercially reasonable; and, (3) not take into account the value or volume of any referrals provided by the group practice physicians.¹¹

Violations of the AKS can trigger a violation of the False Claims Act (FCA).¹² The FCA imposes civil monetary penalties in an amount between \$5,000 to \$10,000 per claim, as well as treble damages, upon any individual who knowingly submits a false or fraudulent claim to, or

uses false records to induce payment from, the U.S. government.¹³ The FCA is a potent fraud and abuse enforcement tool, as it allows private individuals, also known as *qui tam* relators or *whistleblowers*, to bring suits on behalf of the government.¹⁴

The DOJ's Complaint in Intervention alleges the same general facts (although with more specificity by the Government). The "sophisticated business integration" between Methodist and West was memorialized through several agreements:

- (1) An Asset Purchase Agreement (APA), wherein Methodist purchased almost all of West's outpatient locations and certain tangible and intangible assets of West;
- (2) A Professional Services Agreement (PSA), wherein 28 West physicians were compensated by Methodist on a productivity basis for providing inpatient or outpatient oncology services;
- (3) A Management Services Agreement (MSA), wherein West physicians were to "provide management services across the entire...adult oncology service line, inpatient and outpatient, at six of Methodist's facilities..., the Cancer Center Sites, and any other off-campus oncology care sites...where West provided services under the PSA;"¹⁵
- (4) A Leased Employee Agreement, wherein "Methodist leased West's 193 non-physician employees," for which "Methodist paid West the same rate that West compensated these leased employees...on a pass-through basis"; and,
- (5) An Unwind Agreement, wherein West could terminate the entire transaction and buy back what it had sold after the first six months of the arrangement.¹⁶

Beyond these transactions (and the payments made by Methodist for these services and assets from West), Methodist also allegedly made a separate \$7 million investment in ACORN Research, LLC, in which West and its medical director had a personal financial interest.¹⁷

As a result of this arrangement, Methodist "was able to establish a new stream of income through reimbursements for outpatient treatment...[and] a huge increase in referrals for inpatient services from West, which previously referred the bulk of its patients to Methodist's competitors."¹⁸ Further, Methodist was able

to enroll in the 340B Drug Pricing Program to receive discounts on some of its drugs, including oncology infusion drugs; this resulted in the health system receiving \$50 million in profit in one year alone.¹⁹

Notably, Methodist and West obtained Fair Market Value (FMV) opinions related to the APA, PSA, MSA, and the ACORN investment.²⁰ While the Government does not go into details on the opinions related to the first or last of those transactions, it does briefly discuss the FMV opinion on the PSA and goes into greater detail regarding the numerous FMV opinions related to the MSA. While the Government does not appear to assign fault to the FMV opinions (or the valuation firms that prepared them), it does note that, in regard to the PSA, the “opinion does not include any reference to the cost of benefits that Methodist paid...[t]he opinion also notes that there may be a need for a new opinion in 2014...[a] new opinion, however, was not obtained until 2016.”²¹ In regard to the MSA, which compensation was supposedly tied to a percentage of the oncology service line revenues, and manifested as a combination of base management fees and additional incentive compensation, the Government noted that the first FMV opinion was rendered in late 2011.²² Then, in 2014, to support an increase in management fees, West engaged two valuation firms, and ultimately accepted the higher of the two FMV opinions (which was over \$1 million more).²³ Yet another FMV opinion was sought by West in 2016, for which the practice engaged a different valuation firm.²⁴ A fourth round of MSA fee increases necessitated an additional FMV opinion in 2017.²⁵ It appears that in most of these valuations, West allegedly provided inaccurate data to the valuation firms that had the effect of increasing the revenue, resulting in a higher range of fees.²⁶

The Government alleges that although Methodist paid West management fees at a continually increasing rate between 2012 and 2018, the West physicians did not provide management services for Methodist, and in fact were paid management fees to grow West. The MSA was never overseen or audited as contemplated by the agreement and no time records or other documentation were ever provided as evidence that the management services were actually provided.²⁷

In general, the government makes clear that their allegations center in large part on Methodist and West not following the terms of their various agreements.²⁸ To state another way, services were compensated by Methodist even though they were never performed by West. Further, the Government emphasizes that West, which had the largest market share of cancer patients in the area, had not provided many referrals to Methodist prior to its 2012 agreement, but subsequently referred practically all of its patients to Methodist during the term of their arrangement.

The suit is currently in the discovery phase.²⁹ Interestingly, the DOJ informed the court in September 2019 that “it was not intervening in the case ‘at this time’ but its investigation into the matter would continue.”³⁰ The Government filed its motion to intervene in October 2021, which Methodist contested, arguing that the DOJ failed to show “good cause” for why it had waited so long to intervene.³¹ While the DOJ “intervenes in fewer than 25% of whistleblower lawsuits,”³² it is unclear from the court filings what prompted the DOJ to ultimately intervene in this case. Nevertheless, as the arrangements underlying this lawsuit are fairly ubiquitous in the healthcare industry, both hospitals and physicians would be well-served to follow the developments in this case.

1 “United States and State of Tennessee ex rel. Jeffery H. Liebman and David M. Stern v. Methodist Le Bonheur Healthcare, et al.” Case No: 3:17-cv-00902 (M.D. Tenn., December 13, 2019), Second Amended Complaint, p. 4.

2 *Ibid*, Notably, the Government only alleges violations of the FCA and AKS. “United States and State of Tennessee ex rel. Jeffery H. Liebman and David M. Stern v. Methodist Le Bonheur Healthcare, et al.” Case No: 3:17-cv-00902 (M.D. Tenn., April 11, 2022), Complaint in Intervention, p. 68-71.

3 *Ibid*, p. 4 and 12

4 *Ibid*, p. 5.

5 *Ibid*, p. 4 and 12

6 *Ibid*, p. 6.

7 *Ibid*, p. 6.

8 “Criminal Penalties for Acts Involving Federal Health Care Programs” 42 U.S.C. § 1320a-7b(b)(1).

9 “Exceptions” 42 C.F.R. §§ 1001.952(d) (2016).

10 “Re: Malpractice Insurance Assistance” By Lewis Morris, Chief Counsel to the Inspector General, United States Department of Health and Human Services, Letter to [Name redacted], January 15, 2003, <https://oig.hhs.gov/fraud/docs/alertsandbulletins/malpracticeprogram.pdf> (Accessed 10/2/19), p. 1.

11 “Exceptions” 42 CFR § 1001.952(d).

12 “False claims” 31 U.S.C. § 3729(a)(1).

13 *Ibid*.

14 *Ibid*.

15 “United States and State of Tennessee ex rel. Jeffery H. Liebman and David M. Stern v. Methodist Le Bonheur Healthcare, et al.” Case No: 3:17-cv-00902 (M.D. Tenn., April 11, 2022), Complaint in Intervention, p. 3.

16 *Ibid*, p. 2.

17 *Ibid*, p. 2.

18 *Ibid*, p. 3.

19 *Ibid*, p. 3.

20 *Ibid*, p. 28.

21 *Ibid*, p. 27.

22 *Ibid*, p. 29-30.

23 *Ibid*, p. 51.

24 Although the Government notes that the valuation firm’s staff had previously worked for one of the valuation firms that had been engaged for a previous valuation of the MSA.

25 Case No: 3:17-cv-00902 (M.D. Tenn., April 11, 2022), Complaint in Intervention, p. 53.

26 *Ibid*, p. 52.

27 *Ibid*, p. 48.

28 *Ibid*, p. 55.

29 “United States and State of Tennessee ex rel. Jeffery H. Liebman and David M. Stern v. Methodist Le Bonheur Healthcare, et al.” Case No: 3:17-cv-00902 (M.D. Tenn., December 13, 2019), Civil Docket (Accessed 5/26/22).

30 The DOJ began its investigation in mid-2018. “Lawsuit: Methodist, West Clinic defrauded healthcare programs through kickback arrangement” By Max Garland, Memphis Commercial Appeal, October 14, 2020, <https://www.commercialappeal.com/story/money/business/2020/10/14/methodist-le-bonheur-healthcare-west-clinic-lawsuit-alleged-kickbacks/3649942001/> (Accessed 5/26/22).

31 The FCA (42 U.S.C. § 3730 (c)(3)) allows the Government to intervene late only upon a showing of good cause. “United States and State of Tennessee ex rel. Jeffery H. Liebman and David M. Stern v. Methodist Le Bonheur Healthcare, et al.” Case No: 3:17-cv-00902 (M.D. Tenn., Oct. 22, 2021), Methodist’s Response in Opposition to United States’ Motion to Intervene for Good Cause, p. 2.

32 “DOJ joins Methodist Le Bonheur Healthcare kickback lawsuit” By Alex Kacik, Modern Healthcare, April 12, 2022, <https://www.modernhealthcare.com/legal/doj-joins-methodist-le-bonheur-healthcare-kickback-lawsuit> (Accessed 5/26/22).



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