

Free Parking for Physicians? Federal Court Dismisses Whistleblower Suit

On April 18, 2017, the District Court of the Middle District of Florida found that BayCare, a Florida health system, did not violate the *Stark Law* (Stark), *Anti-kickback Statute* (AKS), or the *False Claims Act* (FCA), in providing free parking access to its physician subtenants.¹ In the 2014 case entitled, *U.S. and State of Florida ex rel. Bingham v. BayCare Health System*, the plaintiff, Thomas Bingham (Bingham), brought a FCA lawsuit on behalf of the U.S. government (also known as a *qui tam* action, or a whistleblower suit²) against BayCare Health Systems (BayCare), a community-based health system consisting of ten not-for-profit hospitals.³ In BayCare's *Motion for Summary Judgment*, the court considered whether offering access to free parking by a health system to physicians, staff, and patients amounted to illegal remuneration by the health system to referring physicians.

Under Stark, a physician who has a direct or indirect "financial relationship" (defined as an "unbroken chain" of remuneration⁴) with an entity may not make referrals for *designated health services* (DHS) to that entity.⁵ Additionally, the AKS prohibits any person or entity from making or accepting remunerations to induce or reward any person, in cash or in kind, for referring, recommending, or arranging for federally-funded medical items and services, under Medicare and Medicaid.⁶ The violation of either Stark or AKS often "opens the door" for a claim under the FCA, which law prohibits any person from knowingly presenting, or causing to be presented, to an officer, agent, contractor, or employee of the U.S. government, a false or fraudulent claim for payment or approval,⁷ as Stark and AKS violations typically involve false submissions to federally funded programs.⁸ The BayCare case is somewhat unique in that Bingham is a real estate appraiser who has previously pursued similar *qui tam* legal actions against other healthcare organizations;⁹ if successful, a legal victory in such an action would likely net him a large sum of money.¹⁰


Bingham made three principal arguments in his complaint alleging that BayCare had violated Stark, the AKS, and the FCA when it entered into two lease agreements for the construction of medical office buildings (MOBs) on the BayCare campus.¹¹ In the leases, BayCare granted the MOB tenant the right to use the BayCare facility's parking garage and valet service, which right the MOB tenant passed on to its subtenants,

i.e., the physician groups.¹² Bingham first alleged that BayCare violated Stark by inducing referrals through the offer of free parking to the physician tenants.¹³ Bingham asserted that a larger physician practice in the MOB would benefit more economically than a smaller practice, due to an enhanced avoidance of cost, because the larger practices (which have more staff and patients) require more parking.¹⁴ Bingham additionally argued that a larger practice refers more patients, therefore tying the free parking spaces to the volume and value of referrals by the physician group tenants.¹⁵ Second, Bingham alleged that BayCare violated the AKS by offering free parking and valet services, which was illegal remuneration to a referring physician.¹⁶ Third, Bingham alleged that because compliance with Stark and the AKS is a prerequisite for reimbursement from Medicare, by violating Stark and AKS, BayCare violated the FCA.¹⁷

In dismissing Bingham's lawsuit, the court held that BayCare did not have a direct compensation agreement with physicians in the MOBs because the lease granted parking benefits to the tenants and subtenants, i.e., the MOBs and physician groups, and not the physicians directly.¹⁸ The physician group tenants, in turn, chose to provide their physicians with the free parking spots that had been granted to the groups under the lease.¹⁹ Therefore, the "unbroken chain" of remuneration required by Stark did not exist.²⁰ The court further held that the physicians' compensation was not tied to volume or value of referrals because the compensation was contracted in advance with an express clause as that the compensation not be tied to volume or value of referrals, and parking was calculated into the rental price.²¹ Lastly, because both Stark and AKS violations were defeated, it was therefore impossible for this FCA allegation to survive.²²

In dismissing this case, the district court has indicated that amenities such as free parking for physicians may not be illegal remunerations if there is no evidence that those amenities are being tied to the volume or value of referrals.²³ However, healthcare organizations may be well-served to exercise caution in the drafting of lease agreements including not just physician groups, but also intermediary companies such as medical office buildings, to ensure that the agreement terms are protected under the applicable fraud and abuse law exception or safe harbor, and that no "unbroken chain" of remuneration exists that may run risk of violating fraud and abuse laws.

- 1 “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., Jan. 13, 2013), Plaintiff’s Complaint p. 2-17.
- 2 “Civil Actions for False Claims” 31 U.S.C. § 3730(b) (2010).
- 3 “U.S. ex rel. Bingham v. BayCare Health System” Case No. 8: 14-cv-73-T-23EAJ (M.D. Fla., Jan. 13, 2013), Plaintiff’s Complaint, p. 3.
- 4 “Financial relationship, compensation, and ownership or investment interest” 42 C.F.R. § 411.354 (January 1, 2016). “Remuneration” is “any payment or benefit, made directly or indirectly, overtly or covertly, in cash or in kind.”
- 5 “Bingham v. BayCare Health Sys.”, No. 8:14-CV-73-T-23JSS, 2016 WL 8739056, 5-6 (M.D. Fla. Dec. 16, 2016), report and recommendation adopted, No. 8:14-CV-73-T-23JSS, 2017 WL 1386838 (M.D. Fla. Apr. 18, 2017).
- 6 “Criminal Penalties for Acts Involving Federal Health Care Programs” 42 U.S.C. 1320a-7b(b) (2015).
- 7 “Civil Actions for False Claims” 31 U.S.C. § 3730(d) (2010).
- 8 “Health Care Reform: Substantial Fraud and Abuse and Program Integrity Measures Enacted” McDermott Will & Emery, April 12, 2010, p. 3; “Patient Protection and Affordable Care Act,” Pub. L. No. 111-148, § 6402, 124 Stat. 119, 759 (March 23, 2010).
- 9 See, e.g., “U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc.” Case No. 1:13cv23671-MGC (S.D. Fla., Aug. 15, 2014). For further information, see “Appraiser Files Multiple Qui Tam Suits Against Health Systems” Health Capital Topics, Vol. 8, Issue 9, September 2015, https://www.healthcapital.com/hcc/newsletter/09_15/APPRASISER.pdf (Accessed 6/28/17).
- 10 “U.S. ex rel. Bingham v. BayCare Health System,” Jan. 13, 2013; “U.S. and State of Florida ex rel. Thomas Bingham v. HCA, Inc.,” Aug. 15, 2014 First Amended Complaint, p. 4.; “Justice Department Recovers Over \$4.7 Billion From False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History” Office of Public Affairs, Department of Justice, December 14, 2016, <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>, (Accessed 6/5/17).
- 11 “U.S. ex rel. Bingham v. BayCare Health System,” Jan. 13, 2013
- 12 “Bingham v. BayCare Health System”, No. 8:14-CV-73-T-23JSS, 2016 WL 8739056, at *1 (M.D. Fla. Dec. 16, 2016),
- 13 “U.S. ex rel. Bingham v. BayCare Health System,” Jan. 13, 2013)
- 14 *Ibid.*
- 15 *Ibid.*
- 16 *Ibid.*
- 17 *Ibid.*
- 18 “Bingham v. BayCare Health Sys.”, No. 8:14-CV-73-T-23JSS, 2016 WL 8739056, 2-5 (M.D. Fla. Dec. 16, 2016), report and recommendation adopted, No. 8:14-CV-73-T-23JSS, 2017 WL 1386838 (M.D. Fla. Apr. 18, 2017).
- 19 *Ibid.*
- 20 *Ibid.*
- 21 *Ibid.*
- 22 *Ibid.*
- 23 *Ibid.*




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