

11th Circuit Holds: No Remuneration for Fair Market Value

On July 31, 2019, the U.S. Court of Appeals for the Eleventh Circuit affirmed a lower court’s decision, in favor of HCA (a publicly-traded healthcare services provider), to grant summary judgment on certain claims, and dismiss other claims, brought by Thomas Bingham, a real estate appraiser and “*serial relator*.”¹ Bingham alleged that HCA provided “*sweetheart deals*” to physician tenants in connection with medical office building (MOB) projects in Missouri and Florida, through the provision of subsidies to developers, which developers in turn passed on to the physician tenants in the form of office improvements, low initial lease rates, cash-flow participation agreements, marketing, and restricted use waivers.² Bingham alleged that the benefits provided by the developers induced physician tenants to refer patients to HCA hospitals, which, Bingham alleged, violates the *Anti-Kickback Statute* (AKS), physician self-referral laws (the “*Stark Law*”), and the *False Claims Act*.³

Healthcare organizations face a range of federal and state legal and regulatory constraints, which affect their formation, operation, procedural coding and billing, and transactions. Fraud and abuse laws, specifically those related to the AKS and the Stark Law, may have the greatest impact on the operations of healthcare organizations. The AKS and Stark Law are generally concerned with the same issue – the financial motivation behind patient referrals. However, while the AKS is broadly applied to payments between providers or suppliers in the healthcare industry and relates to any item or service that may be paid for under any federal healthcare program, the Stark Law specifically addresses the referrals from physicians to entities with which the physician has a financial relationship for the provision of defined services that are paid for by the Medicare program.⁴ Additionally, while violation of the Stark Law carries only civil penalties, violation of the AKS carries both criminal and civil penalties.⁵

Enforcement of the AKS and the Stark Law may occur under the *False Claims Act* (FCA), which creates liability for any person who “*knowingly presents, or causes to be presented, to an officer or employee of the United States government...a false or fraudulent claim for payment or approval*.”⁶ The FCA has become an increasingly important statute in enforcing federal healthcare fraud and abuse laws, as it allows any private citizen to enforce

the FCA by filing a complaint against a party alleging fraud against the federal government.⁷

In analyzing the *Bingham v. HCA* case on appeal, the Eleventh Circuit separately reviewed the Florida MOB allegations, which claimed FCA violations, and the Missouri MOB allegations, which claimed AKS and the Stark Law violations.⁸ The appellate court affirmed the lower court’s ruling on the Florida MOB FCA allegations on procedural grounds, but did note that Bingham did “*...not state with any particularity,*” which is a requirement of FCA allegations, “*how HCA conveyed remuneration directly or indirectly to specific tenants of the [Florida] MOB*” and, instead, simply stated “*...in a conclusory fashion that...the total amount of the ground lease payment...was less than fair market value.*”⁹

Perhaps the greatest takeaway from the court’s order was its language regarding the Missouri MOB allegations. In affirming the lower court’s ruling on summary judgment, the Eleventh Circuit focused on the AKS claims, and, specifically, the definition of “*remuneration*.” Because the AKS does not specifically define “*remuneration*”, the court reviewed the term as defined in *Black’s Law Dictionary* and in the *Civil Monetary Penalties* (CMP) law; the court pointed out that “*remuneration*” under the CMP law was defined, in part, as those “*items or services...for other than fair market value.*”¹⁰ Because, the court noted, “[*i*n a business transaction like those at issue in this case, the value of a benefit can only be quantified by reference to its fair market value”, it asserted that “*fair market value...is rather something Relator must address in order to show that HCA offered or paid remuneration to physician tenants.*”¹¹ Therefore, the “*critical question*” to ask in examining Bingham’s AKS allegations is “*whether physician tenants received anything of value from [the developer] under or in connection with their leases in excess of the fair market value of their lease payments.*”¹² In answering this question, the court found that Bingham was unable to substantiate his claims that the rents and cash-flow participation agreements were not fair market value; in fact, HCA had two market rent studies conducted that found these arrangements to be within the range of fair market value.¹³ Therefore, the court held that the “*Relator has not shown that HCA conveyed any remuneration to physician tenants.*”¹⁴

The discussion of remuneration by the Eleventh Circuit in this case may be used by future defendants to defend lease agreements (and other financial arrangements) that are alleged to be in violation of the AKS. Pursuant to the court’s reasoning, the relators/government bear the burden of alleging and proving that the payments at issue are not fair market value. As one law firm noted “*The Bingham decision will thus likely be cited for the proposition that fair market value compensation is an*

absolute defense to an AKS allegation.”¹⁵ This assertion underscores the importance of obtaining a certified opinion, prepared by an independent certified valuation professional and supported by adequate documentation, as to whether a proposed transaction is at fair market value, as it will significantly enhance the efforts of healthcare providers to establish a defensible position that a prospective financial arrangement is in compliance.

1 “United States of America ex rel. Thomas Bingham v. HCA, Inc.” Case No. 1:13-cv-23671-MGC (S.D. Fla. July 31, 2019), Judgment, p. 2-3; “A Hospital’s Deserving Stark and AKS Victory—But At What Cost?” By Tony Maida, T. Reed Stephens, and Nicholas Alarif, McDermott Will & Emery, May 31, 2017, <https://www.fcaupdate.com/2017/05/a-hospitals-deserving-stark-and-aks-victory-but-at-what-cost/> (Accessed 9/24/19).
Of note, this lawsuit is also not Bingham’s first allegations relating to financial relationships between health systems and physician tenants. A June 2017 *Health Capital Topics* article entitled, “Free Parking for Physicians? Federal Court Dismisses Whistleblower Suit,” discussed Bingham’s case against BayCare Health System related to free parking access to physician subtenants. The court in the suit held that amenities such as free parking for physicians may not be illegal remuneration if there is no evidence that those amenities are tied to the volume or value of referrals. “Free Parking for Physicians? Federal Court Dismisses Whistleblower Suit” *Health Capital Topics*, Vol. 10, Issue 6 (June 2017), https://www.healthcapital.com/hcc/newsletter/06_17/HTML/BV B/10_6_formatted_hc_topics_baycare_draft_6.30.php (Accessed 9/24/19).

2 “United States of America ex rel. Thomas Bingham v. HCA, Inc.” Case No. 1:13-cv-23671-MGC (S.D. Fla. July 31, 2019), Judgment, p. 4.

3 *Ibid*, p. 8-14.
4 “Fundamentals of the Stark Law and Anti-Kickback Statute” By Asha B. Scielzo, American Health Lawyers Association, *Fundamentals of Health Law*: Washington, DC, November 2014, https://www.healthlawyers.org/Events/Programs/Materials/Documents/FHL14/scielzo_slides.pdf (Accessed 9/23/19), p. 4-6, 17, 19, 42.
5 *Ibid*, p. 42.
6 “False Claims” 31 U.S.C. § 3729(a).
7 “Civil Actions for False Claims” 31 U.S.C. § 3730(b).
8 “Bingham v. HCA” (S.D. Fla. July 31, 2019), Judgment, p. 8-20.
9 *Ibid*, p. 19.
10 *Ibid*, p. 9-10 (citing 42 U.S.C. § 1320a-7a(i)(6)).
11 *Ibid*, p. 10.
12 *Ibid*.
13 *Ibid*, p. 10-11.
14 *Ibid*.
15 “Remuneration? Not if It’s Fair Market Value, Says Eleventh Circuit” By Amy Hooper Kearbey and Tony Maida, McDermott Will & Emery, September 17, 2019, <https://www.mwe.com/insights/remuneration-not-if-its-fair-market-value-says-eleventh-circuit/> (Accessed 9/24/19).

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