

## Hospital Settles False Claims Act Allegations for \$18.2 Million

On December 2, 2021, the U.S. Department of Justice (DOJ) announced that it had entered into an \$18.2 million settlement with Flower Mound Hospital, a 91-bed hospital located northwest of Dallas, to resolve claims that the hospital had violated the Stark Law, the Anti-Kickback Statute (AKS), and the False Claims Act (FCA) by making improper inducements to referring physicians.<sup>1</sup> This *Health Capital Topics* article will review the facts underlying the settlement.

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.<sup>2</sup> 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.<sup>3</sup>

A violation of the FCA can be triggered by violations of the AKS and/or Stark Law.<sup>4</sup> The 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.<sup>5</sup> Violations of the AKS are punishable by up to five years in prison, criminal fines up to \$25,000, or both.<sup>6</sup> These *safe harbors* set out regulatory criteria that, if met, shield an arrangement from regulatory liability, and are meant to protect transactional arrangements unlikely to result in fraud or abuse.<sup>7</sup> However, the AKS does contain certain *safe harbors* that set out regulatory criteria that, if met, shield an arrangement from regulatory liability, and are meant to protect transactional arrangements unlikely to result in fraud or abuse.<sup>8</sup> The Stark Law governs those physicians (or their immediate family members) who have a financial relationship (i.e., an ownership interest, investment interest, or compensation arrangement) with an entity, and prohibits those individuals from making Medicare referrals to those entities for the provision of designated health services (DHS), unless the referral is protected by one or more of the numerous exceptions delineated by the statute.<sup>9</sup> Notable to the allegations against Flower Mound Hospital, ownership interests in a hospital are one of the financial relationships protected by the Stark Law exceptions, so long as:

- (1) The referring physician is authorized to perform at the hospital; and,
- (2) The ownership or investment interest is in the entire hospital and not merely in a distinct part or department of the hospital.<sup>10</sup>

Texas Health Presbyterian Hospital Flower Mound (referred to as “Flower Mound Hospital” in the DOJ settlement filings), is located in Flower Mound, Texas, and is jointly owned by Texas Health Resources (a non-profit health system that serves patients throughout North Texas<sup>11</sup>) and several physicians. The government’s underlying lawsuit was originally brought in 2019 by a physician-owner at the hospital under the FCA’s whistleblower provisions.<sup>12</sup> The lawsuit alleged that the hospital violated fraud and abuse laws when it “repurchased shares from physician-owners aged 63 or older [in 2019] and then resold those shares to younger physicians” in 2021 because the hospital took into account the volume or value of these physicians’ referrals in determining: (1) to which physicians the shares would be resold and (2) the number of shares that each physician would receive.<sup>13</sup> In other words, the hospital allegedly conditioned their future ownership (and the extent of that ownership) on each physician’s expected referrals.<sup>14</sup> While additional facts underlying the lawsuit are sparse, the government specifically alleged that the hospital’s relationships with the physician-owners failed to satisfy the exception described above related to physician ownership interests in hospitals (generally known as the Whole Hospital Exception to the Stark Law).<sup>15</sup>

As a result of the settlement, Flower Mound Hospital will pay \$18.2 million in restitution, of which:

- (1) Over \$17.7 million will be payable to the federal government to resolve the claims related to Medicare and TRICARE<sup>16</sup>;
- (2) Approximately \$486,500 will be payable to the State of Texas to resolve the claims related to Medicaid; and,
- (3) Approximately \$3 million will be payable to the whistleblower for his efforts.<sup>17</sup>

Additionally, Flower Mound Hospital entered into a five-year corporate integrity agreement (CIA) with the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS), which requires, among other items, that the hospital maintain a compliance program, hire an Independent Review

Organization to review arrangements entered into by or on behalf of the hospital, and, for certain executives, obtain compliance-related certifications.<sup>18</sup>

While the number of FCA suits brought by whistleblowers stayed stagnant between 2019 and 2020 (potentially due to the COVID-19 pandemic), over the

past five years, there has been a significant uptick in the number of FCA suits brought by whistleblowers (with 672 *qui tam* cases initiated in 2020 alone).<sup>19</sup> This trend, as well as the total number of new healthcare fraud and abuse enforcement actions initiated, suggest that regulatory scrutiny of healthcare transactions will remain high going forward.

1 “Flower Mound Hospital to Pay \$18.2 Million to Settle Federal and State False Claims Act Allegations Arising from Improper Inducements to Referring Physicians” U.S. Department of Justice, Press Release, December 2, 2021, <https://www.justice.gov/opa/pr/flower-mound-hospital-pay-182-million-settle-federal-and-state-false-claims-act-allegations> (Accessed 12/10/21).  
2 “False claims” 31 U.S.C. § 3729(a)(1).  
3 *Ibid.*  
4 *Ibid.*  
5 “Criminal Penalties for Acts Involving Federal Health Care Programs” 42 U.S.C. § 1320a-7b(b)(1) (2013).  
6 *Ibid.*  
7 “Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute; Final Rule” Federal Register, Vol. 64, No. 223 (November 19, 1999), p. 63518, 63520.  
8 *Ibid.*  
9 “Prohibition on certain referrals by physicians and limitations on billing” 42 CFR § 411.353.  
10 “Exceptions to the referral prohibition related to ownership or investment interests” 42 CFR § 411.356.

11 “About Texas Health” Texas Health Resources, <https://www.texashealth.org/About-Texas-Health> (Accessed 12/10/21).  
12 U.S. Department of Justice, Press Release, December 2, 2021.  
13 *Ibid.*  
14 “Recent Settlement Illustrates Enforcement Risks Associated With Physician Roll-Ups” By Jaime L.M. Jones, et al., Sidley December 9, 2021, <https://fcablog.sidley.com/recent-settlement-illustrates-enforcement-risks-associated-with-physician-roll-ups/> (Accessed 12/10/21).  
15 “Settlement Agreement” available at: <https://www.justice.gov/opa/press-release/file/1452851/download> (Accessed 12/10/21), p. 3.  
16 TRICARE is the health insurance program for military service members, retirees, and their families. “About Us” TRICARE, <https://www.tricare.mil/About> (Accessed 12/17/21).  
17 U.S. Department of Justice, Press Release, December 2, 2021.  
18 *Ibid.*  
19 “Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020” Department of Justice, Office of Public Affairs, Press Release, January 14, 2021, <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020> (Accessed 12/10/21).



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