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Health System, Clinic Settle FCA Case for $10M, Allegedly Ignored Attorney's Advice

By Nina Youngstrom

When Agnesian HealthCare in Wisconsin was negotiating a new professional services agreement (PSA) with Fond du Lac Regional Clinic for 2016, the attorney who was hired as a neutral party discovered the physicians allegedly were "significantly overcompensated" based on data from the Medical Group Management Association (MGMA). He proposed a new compensation methodology, saying "I'm here to make you compliant because you aren't," according to allegations in a False Claims Act complaint,[1] which was filed by a whistleblower. Instead, the attorney was terminated and Agnesian allegedly kept "physician compensation at historic and above fair market value levels" in return for their referrals, the complaint contends.

Now Agnesian HealthCare and Fond du Lac Regional Clinic have agreed to pay $10 million[2] to settle the whistleblower's allegations, according to Phillips & Cohen, one of the law firms that represented the whistleblower, Clark Searle, an orthopedic surgeon at the clinic who left in 2017. He filed the lawsuit under the False Claims Act[3] (FCA), alleging Agnesian HealthCare and Fond du Lac Regional Clinic violated the Stark Law and the Anti-Kickback Statute.

The Department of Justice declined to intervene in the complaint. "These False Claims Act cases based on Stark continue to be very difficult to defend even in non-intervened case," says Houston attorney Adam Robison, with King & Spalding, who was not involved in the case. If there are "fair market value reports and guidance from lawyers on steps that should be taken to comply with the law and they are not followed, it makes it more difficult to defend," although he emphasized these are allegations only.

Agnesian and Clinic Deny Allegations

Agnesian HealthCare, which is a member of SSM Health of Wisconsin, and Fond du Lac Regional Clinic denied the allegations and didn't admit liability in the settlement, says Holly Brenner, regional vice president of marketing, communications and foundations for SSM Health. She said the organizations "take very seriously our obligation to comply with all laws and regulations as we work to provide exceptional health care to our communities. We believe we had strong defenses to the claims asserted, which may have influenced the government's decision not to intervene. Nonetheless, we have decided to settle this matter to avoid the cost, expense, and potential disruption to our healthcare ministry. Together, Agnesian HealthCare and the Fond du Lac Regional Clinic maintain our focus on providing excellent health care to the patients and families we are privileged to serve."

Agnesian, a three-hospital system, had PSAs with the clinic, which employs its physicians. The clinic is exclusively affiliated with Agnesian, which does billing and collection for the clinic and "pays annual aggregate compensation to the Clinic to cover the salaries of the Clinic's employed physicians," the complaint says.

According to the complaint, before 2016, when calculating physician compensation, Agnesian allegedly factored in a department adjustment, which varied by specialty and allegedly was used to reward the volume and value of referrals to Agnesian hospitals and other facilities. Specialists who sent fewer referrals to other clinic physicians or to the hospitals didn't have much luck getting their department adjustment increased, the complaint alleged. Agnesian also allegedly had side deals with physicians who referred a lot of patients to the hospitals or did a lot of procedures. For example, from 2008 to 2011, Agnesian paid a cardiothoracic surgeon $200,000 annually to serve as medical director for its cardiology program even though he allegedly did little or no work for that money.

"Beginning in 2016, the method, but not the fact, of Agnesian's physician overcompensation changed. Defendants painstakingly constructed a revised compensation methodology that on its face appears to reward physicians based on quality and productivity," the complaint alleged. "In fact, the compensation rates and methodology were backed into with Defendants' primary motivator being maintaining the physicians' existing compensation." The whistleblower alleged in the 2017 amended complaint that total payments to many of the physicians are above fair market value and not commercially reasonable and are designed to ensure they refer patients to Agnesian.

Gap Alleged Between Compensation, Productivity

Because the PSA required an annual compensation review to ensure its fair market value, Agnesian in 2008 hired MGMA's Healthcare Consulting Group, which found problems with the compensation, according to the complaint. The draft analysis allegedly determined that the work relative value unit (wRVU) payments "exceeded the benchmark medians by up to 220%" for all but two physicians. Agnesian never finalized the draft and instead had the clinic administrator do a compensation analysis. He determined it was reasonable, relying "almost entirely on a single cherry-picked measure ('gross charges') to justify the pay of highly-compensated physicians," the complaint alleged. Every year until he left the clinic in 2014, the administrator performed the compensation analysis, although he lacked training in assessing physician compensation.

In 2014, as it negotiated the new PSA, Agnesian hired the lawyer, Michael Bamberger, as an impartial consultant. His analysis found that the physicians' 2012 compensation was in the 69th percentile for the MGMA Midwest region, but their wRVUs, which represent productivity, were in the 47th percentile, the complaint alleged. He suggested a compensation method based on MGMA Midwest compensation data, which would reduce pay, including for primary care physicians. Agnesian couldn't continue to pay the primary care doctors at the clinic "so much money for so little work," the attorney allegedly said.

He apparently didn't see wiggle room. "At a December 8, 2014 meeting of the PSA Committee, in response to a question about whether pay cuts for primary care physicians could be phased in over time, Mr. Bamberger stated that 'the plan isn't compliant now and needs to be brought into compliance in one step, not over time,'" the complaint alleged.

After the attorney's compensation proposal was rejected, Agnesian adopted a different model with "contortions designed to reward high-referring physicians at every step of the equation," the complaint alleged. For example, oncologists are compensated at the 60th percentile for their "best fit" regardless of their productivity, which the complaint alleged has been as low as the 10th or 20th percentile.

Robison says that hospitals play with fire when they hire a consultant to do a compensation valuation and then set it aside. "You need to take action on that fair market value analysis," he advises. "If you don't, it will potentially be used against you in any False Claims Act case."

He also doesn't read too much into the fact that the Department of Justice didn't get involved in the lawsuit. "There is some level of significance to the government's decision not to intervene, but there can be a lot of reasons it doesn't intervene," such as limited resources. "It's not necessarily indicative the case is not a good one."

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1 United States of America, and the state of Wisconsin, ex rel. Dr. Clark Searle v. Agnesian Healthcare, Inc., and Fond Du Lac Regional Clinic, S.C., Case No. 14-C-0969, N.W.2d (Wis. 2017), http://bit.ly/38h28eo.
2 Phillips & Cohen, "Wisconsin hospital and affiliated physician group pay $10M to settle whistleblower lawsuit alleging kickbacks," Case Review, January 6, 2020, http://bit.ly/2swGrrm.
3 31 U.S.C. §§ 3729-3733.