

Healthcare Law Alert – Whistleblower Case Brought by Former Upstate Hospital CEO Against Georgia’s Memorial Health Settles for \$9.8 Million

Stark Law Violations at Heart of Allegations

On December 23, 2015, the United States Department of Justice announced that it had reached a settlement with Savannah, Georgia-based Memorial Health University Medical Center (Memorial Health), along with several affiliated entities, in a whistleblower lawsuit brought by former Upstate Medical University Hospital President and CEO, Phillip S. Schaengold. Memorial Health and its affiliates have agreed to pay \$9.8 million to settle a lawsuit alleging that they violated the federal False Claims Act by compensating many employed physicians within the Memorial Health system in a manner that violated Medicare regulations. The Schaengold lawsuit not only alleged that the compensation violated the Stark law because it exceeded fair market value, but it was calculated to financially reward physicians for referring patients within the system for other services for which Memorial Health could bill Medicare – a violation of the Medicare Anti-Kickback laws. Most damning, Schaengold alleged that not only did he advise the Board of these problems, he also advised that Memorial Health was legally obligated to stop the payments immediately and report the findings to the federal government. Rather than doing so, Schaengold asserted that the Memorial Health Board fired him a few days later, in retaliation. Memorial Health did not admit any wrongdoing as part of the settlement and has vehemently and consistently, throughout the five-year legal battle, denied the claims raised in the complaint.

Schaengold became President and CEO of Memorial Health in June of 2009, immediately after leaving his position at University Hospital in Syracuse, and remained in that position until his abrupt firing in January of 2011. In March of 2011, Schaengold filed a lawsuit under the qui tam or “whistleblower” provisions of the federal False Claims Act. He alleged that shortly after arriving at Memorial Health, he determined, with the assistance of outside independent consultants, that Memorial Health paid many of its employed physicians far in excess of fair market value. Not only was this troubling on its own (the federal physician self-referral prohibition or “Stark” law requires in these kinds of situations that compensation not exceed fair market value), but a 2008 compliance agreement between Memorial Health and the Department of Health and Human Services, under which Memorial Health paid in excess of \$5 million to resolve similar compensation-related compliance concerns, required Memorial Health to annually certify in writing its ongoing compliance with the law and the agreement. Schaengold alleged that when he advised the Board about the problematic compensation packages, the need to change those packages and the need to report the problem to the federal government, he was abruptly fired.

Schaengold’s complaint also pointed to e-mails in which Board members raised concerns that physician referral patterns might change if their compensation packages were cut, as evidence that the Board knew and intended that compensation be tied to physician referral patterns. Such a tie between

referral patterns and compensation would violate the federal anti-kickback laws, separate and apart from the Stark law violations. In sum, Schaengold alleged that the Board knew the compensation packages failed to satisfy the Stark law, knew that it was legally obligated to report the noncompliance per the 2008 compliance agreement and knew that the compensation packages were intimately connected with preserving the physicians' patient referral patterns. The knowledge of the Board members was a critical component of the Schaengold complaint, and likely in its resolution.

While Memorial Health did not admit anything in settling the case, the complaint is instructive on the kinds of alleged actions that may have led to the decision to settle rather than keep fighting.

- The physician practices were losing significant amounts of money, unless hospital revenues derived from physician referrals were counted.
- Contrary to Schaengold's advice, the Board required that such downstream revenue be counted when crafting physician compensation packages.
- Board members openly discussed the connection between compensation and securing the continuation of patient referral patterns.
- Several large groups of specialists, communicating directly with Board members, threatened to leave and join a competitor hospital – taking their patients with them – unless their compensation demands were met.
- Over administration's objections, the Board affirmatively displaced Schaengold and his management team, taking over the direct negotiation of these compensation packages.
- Board members with clear conflicts of interest regarding decisions about physician compensation did not recuse themselves from this process. Physician Board members whose own compensation was at issue were not required to recuse themselves. United Memorial's lead lawyer also had a conflict (his wife was one of the physicians whose compensation was being negotiated) and, likewise, failed to recuse himself.
- The Compliance Officer voiced concerns to the Board similar to Mr. Schaengold's, which were also ignored.

Again, these are only allegations. Memorial Health has denied all claims and challenges the accuracy of some of the assertions contained in the complaint. At the very least, this case is another example of a hospital failing to reach the court room to argue against such allegations.

Information is not yet available on how much of the \$9.8 million settlement will be paid to Schaengold, but it is likely to be several million dollars.

UPDATE AS OF 12/29/15: According to the Settlement Agreement, Schaengold will be paid almost \$2.3 million out of the payment Memorial Health has agreed to make to the federal government. In addition, Memorial Health has agreed to pay Schaengold's attorneys fees and costs in order to resolve Schaengold's remaining claim (for retaliatory discharge from employment), which was not resolved by the Settlement Agreement.

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