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## Little Mercy For Mercy Hospital: Government Gets \$34 Million Settlement in Whistleblower Case

The data's clear. Hospitals lose money on nearly every employed physician.

At least that's the case when you compare what you're supposed to be comparing, which is what the hospitals are supposed to be comparing when setting physician compensation. They can pay a physician for his or her services. But, they can't pay for the value of the physician's referrals to the hospital. Or, wink wink, for nothing.

Hospitals know this. What they sometimes do, is something else.

Just ask Mercy Hospital in Springfield, Missouri.

Earlier this month, Mercy Hospital Springfield (formerly known as St. John's Regional Health Center) and Mercy Clinic Springfield Communities (formerly known as St. John's Clinic) settled a physician compensation related False Claims Act lawsuit, popularly known as a "whistleblower action," for \$34,000,000.

While many physicians are familiar with the fact that the Stark Law prohibits them from making referrals to any hospital with which they have a compensation arrangement or in which they have an investment interest, unless the arrangement falls within one of the law's exceptions, referred to as "safe harbors."

There's another side to the Stark Law violation coin: Claims filed by a hospital as a result of referrals in violation of Stark are false claims.

Additionally, the same fact pattern can trigger violation of other laws, such as the federal Anti-Kickback Statute ("AKS") which, roughly speaking, prohibits any remuneration to induce referrals.

At the heart of the Mercy lawsuit were allegations that the Mercy controlled clinic compensated twelve employed physicians in a manner that improperly took into account the volume and value of the physicians' referrals of patients to Mercy Hospital's Mercy Oncology Infusion Center - Chub O'Reilly Cancer Center (the "Infusion Center"), for certain infusion services.

The allegations included the following points:

Initially, the Mercy Clinic ran the "Infusion Center." The Clinic also employed the physicians, who practiced in the Clinic's Cancer Center. At that time, the physicians participated in the profits of the Infusion Center as a part of their collections-based compensation model.

- Subsequently, Mercy Hospital took over ownership of the Infusion Center.
- The physicians became upset that the loss of Infusion Center profits at the Clinic level was going to reduce their compensation. The defendants assured the physicians that they would be "made whole."
- Subsequently, the physicians compensation model in the clinic was changed to include "work RVU for drug administration in the hospital department." However, the payment was not calculated based on physician work, clinical expense, or malpractice overhead, but rather was "solved for" by working backwards from a desired level of overall compensation.
- Additionally, Mercy Hospital also paid "management fees" to Mercy Clinic on behalf of the physicians. These "management fees" were purportedly paid for the physicians' management of the Infusion Center; however, those physicians were not responsible for management of the Infusion Center.

The Mercy defendants denied the allegations and the settlement doesn't include any admission of guilt.

Out of the \$34,000,000 received in the settlement, \$5,440,000 was paid to the whistleblower, Viran Roger Holden, M.D., Ph.D., a physician employed by Mercy.

### Some essential takeaways for you:

1. Whistleblowing pays better than most day jobs. And, once again, the whistleblower was an insider. In this case, he was a physician employed by a defendant.
2. False Claims Act suits are civil actions. As such, the settlement agreement does not release the Mercy defendants, or anyone else, from potential criminal liability. Although the Stark Law is a civil statute, the AKS is a criminal statute. It remains to be seen whether the Department of Justice, or a Missouri state prosecutor, will bring criminal charges against the Mercy entities, their executives, and the employed physicians.
3. Among the allegations (again, Mercy did not admit any guilt) were that (a) the compensation plan was reverse engineered to make the performance measurement drive the intended compensation outcome, and (b) Mercy created a sham management arrangement to generate payments to the physicians. How different are those underlying fact patterns from the type of "management fees" and other payments that referring physicians often demand from referral-receiving physicians? (Spoiler Alert!) They're not.
4. Physician compensation arrangements are under scrutiny. They're fertile ground for both whistleblowers and for prosecutors.

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5. Think twice about both the form and substance of physician employment agreements. Competent counsel should be brought in at the earliest stage, both in respect of an initial compensation structure and in respect of any contemplated change.

6. "Red teaming" your contracts and relationships, that is, having counsel "attack" your deals to discover compliance weaknesses is cheap in comparison to the cost of mounting a civil defense, paying to settle, absorbing the bad publicity, and then, potentially, repeating the process again at the criminal trial stage.

## Wisdom. Applied. 101 - The Devaluation of Value Based Billing

"Value based billing" remains dominant in the medical industry news, chiefly from the MACRA angle. Mostly, though, it's a lie. Watch and find out why.



## All Things Personal

I just boarded an American Airlines flight in Phoenix

A few minutes before boarding, I watched a gate agent make a woman unpack and remove clothes from her carry-on luggage because, to get it into the "sizing" gauge, she had to push it in.

Perhaps the gate agent didn't notice the other bulging carry-on items, some the size of small goats, being yanked past her and down the jetway by nearly everyone..

Later the gate agent told me that, "if someone doesn't do what I tell them, they don't get on the plane."

The powerless go mad when given a little slice of authority. It's what makes surely cops, rabid airline employees, and nearly all motor vehicle department workers.

Years ago, I had a "gate agent" employee working for me. I got rid of her. Left in place, their attitude destroys customer relationships and infects the workplace.

Do you have one working for you?

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Having fallen for the false promise of a share, hospitals have been willing to give up employment and alignment with their physicians. They have been willing to pay the price of the belief that there's a silver lining to becoming evident that the industry is becoming and that integrated care is the only way to reduce costs. And now, technology is making it possible for a hospital to survive and even thrive.

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Some days, it seems like the only way to practice to vascular surgery practice to a larger group is to acquire a hospital.

The reality is that some hospitals will never be sold, and some will be sold to a hospital.

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A perfect storm of factors is creating a hospital-based medical group.

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How can you find a solution?

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I've spoken at dozens of medical group events, healthcare organization events, large corporate events, university-sponsored events, and private, invitation-only events on topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, [email](#) my Santa Barbara office staff.

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