



For Whom The Whistle Blows

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An interesting whistleblower case should send signals to ASCs, hospitals, and physician investors and contractors . . . as well as to potential whistleblowers.

Late last year, Meridian Surgical Partners, denying that it had done anything improper, paid over \$5 million to settle a federal anti-kickback statute ("AKS") related whistleblower lawsuit. The suit was filed under the federal false claims act ("FCA") by a former employee.

The AKS provides that:

"Whoever knowingly and willfully solicits or receives [or offers or pays] any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both."

The FCA penalizes any person who knowingly presents or causes to be presented to an officer or employee of the U.S. government a false or fraudulent claim for payment or approval. The FCA also penalizes any person who knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government. Whistleblowers, who receive a bounty, may file suit on behalf of the government to obtain civil penalties under the FCA.

Claims made to federal health care programs in the context of an arrangement in violation of the AKS are false claims under the FCA.

A former Meridian employee, the whistleblower, alleged that Meridian had initially purchased a majority interest in an ASC from its physician owners at an *inflated value* in order to induce their continued referral of patients — the first AKS violation.

He also alleged that a few months after Meridian purchased the interests at an inflated value, it sold portions of that interest to other physicians at a *deflated value* in order to induce those physicians to refer patients — the second AKS violation.

Because the ASC filed claims for reimbursement from Medicare after engaging in those alleged AKS violations, the whistleblower filed suit under the FCA.

Rather than proceed toward trial, Meridian paid \$5-plus million to settle the FCA allegations without admitting any actual liability.

What This Means For You

The Meridian case triggers a number of warnings involving fair market valuation.

1. Quite obviously, it's essential that if you're buying or selling an interest in a healthcare venture that implicates the AKS, the interest must be sold or purchased at fair market value. (Note: The compliance issues are much more complex than that but, suffice it to say, fair market value is among the necessary "ingredients" of a properly structured deal.)

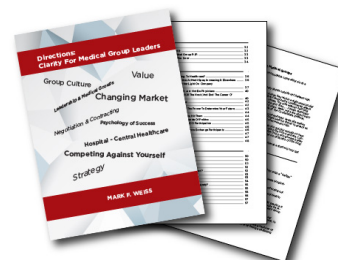
2. Unless there's a drastic change in circumstances, it's highly suspicious for the value of an interest to vary tremendously over a short period of time.

3. While not an issue per se in the Meridian case, the bestowing of other contact rights in healthcare transactions also involves similar notions of fair market value. For example, the

March 31, 2015

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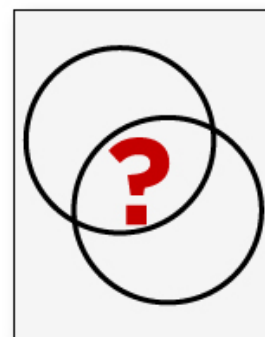
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value of a carveout from an exclusive contract.

4. The whistleblower in the Meridian case was, at least when he gathered his evidence, a Meridian employee. Who do you have working for you? Who are you working for?

5. Although the whistleblower in the Meridian case focused on the false claims allegedly filed by the ASC, if indeed there was a kickback situation, the AKS applies to both sides of the deal. Therefore, it's not only an ASC or a hospital or other issuer of an equity or contract right that must be concerned with compliance. The physician investors who are the buyers or the contract holders have just as much at risk: criminal penalties, civil monetary penalties, debarment from participation in federal healthcare programs, and FCA liability for their claims.

For whom does the whistle blow? Let's keep it from blowing for thou.



Wisdom. Applied. 75 - Entrepreneurial Practice vs. Bureaucratic Existence

A recent trip to a restaurant and the post office illustrates the difference between entrepreneurial medicine and the brave new bureaucratic world of healthcare.

All Things Personal

It was a dream like Jacob Marley's.

You decided to retire from practice and open a studio designing and making custom furniture.

So you open up, only to discover that, unknown to you, your landlord sets the price for your work, whether you sell pieces individually or as part of a package including the design services sold by the landlord itself.

If you've lost control of pricing, can you be a business? Can you continue to offer the same quality or do you have to cut corners on materials and methods? Do you hire less skilled workers?

You toss and turn and become more and more agitated.

And then, the alarm clock sounds.

Oh, it was only a dream. Time to get up and get to work.

You don't want to be late for the ACO negotiations.

Recently Published Blog Posts

Monday, March 16

Blog Post: [Medical Group Hospital Contracts: Beware The Open End](#)

Thursday, March 12

Podcast: [Are You Just Taping Up Problems?](#)

Wednesday, March 11

[Videocast: For Whom Are Hospitals Built?](#)

Monday, March 9

[Blog Post: RFP For Physician Services: Really Foolish Proposition](#)

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on December 30, 2014. Read or download [here](#).

Mark was quoted in the article **Top 5 financial challenges facing physicians in 2015**, published in the December 2014 issue of Medical Economics. Read or download [here](#).

Mark was quoted in the article **Top 15 challenges facing physicians in 2015**, published in the December 2014 issue of Medical Economics. Read or download [here](#).

Mark's article **Bundled Billing or Bungled Billing?** was published in the October 2014 issue of Pain Medicine News. Read or download [here](#).

Mark's article **What's Your Anesthesia Group Worth? And Why It Might Not Make Any Difference** was published in the Summer 2014 issue of Communique. Read or download [here](#).

Upcoming Presentations

Date: April 17, 2015

Time: 2:00 PM

Topic: From the Company Model to Joint Ventures to Just Sending Statements: Anesthesia Business and Deal Structure Compliance Traps

Location: [The Advanced Institute for Anesthesia Practice Management 2015](#), Las Vegas, Nevada

Date: April 17, 2015

Time: 3:20 PM

Topic: Is Your Anesthesia Group a Business or Club?

Location: [The Advanced Institute for Anesthesia Practice Management 2015](#), Las Vegas, Nevada

Our Dallas Office is Moving

Our Dallas office will have a new address effective March 1, 2015:

The Mark F. Weiss Law Firm

One Galleria Tower

13355 Noel Rd., Suite 1700
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