

Having trouble viewing this email? [Click here](#)



August 31, 2015

Follow: [f](#) [t](#) [b](#)

[MFW Website](#) / [Blog, Wisdom. Applied](#) / [Podcasts](#) / [Past Issues](#) / [Q&A Video Series](#) / [Mentor Program](#)

Strange Whistleblower Case With Lessons For All

A strange but interesting False Claims Act ("FCA") case, commonly referred to as a "whistleblower" action, provides some very interesting lessons about the FCA, Stark, and the federal Anti-Kickback Statute ("AKS").

It's strange, because the whistleblower has no relationship at all with the defendants and has no evidence of any particular false claim. It's interesting, because the alleged scheme is tangential and systemic.

For those readers who've worked with me on compliance issues, especially in respect Stark and AKS issues, you know that I've always maintained that systemic compliance violations, as compared to specific instances of direct remuneration than can be tied to an individual claim, can support Stark and anti-kickback violations thus rendering all claims false claims. So, for example, a violative Company Model structure sponsored by a GI group and its controlled CRNAs can render every single claim for service illegal and become fodder for FCA liability.

The Facts in a Nutshell

In a strange turn of events which may indeed be a first, the whistleblower has no inside knowledge of the deal and no familiarity with any party involved. Instead, he is a real estate appraiser who, upon his own investigation, uncovered the alleged scheme.

A hospital holding company leased land at one of its hospital's campus to a medical office building development entity ("MOB") to build a medical office building to serve as a heart center. The lease granted the MOB entity certain parking rights on other hospital property. Those parking rights allowed the MOB entity to escape leasing additional land, to avoid spending \$3.6 million to build a garage, and to avoid the cost of garage maintenance, insurance and taxes.

The whistleblower alleged that one purpose of the hospital company's arrangement in connection with parking was to have the MOB pass through to physician tenants part or all of the millions of dollars of savings in order to encourage those physicians to make or increase referrals to the hospital. He also alleged that an amendment to the lease which allowed referring physicians, their staff and patients to use the hospital's parking facilities at no charge resulted in an annual parking benefit to each physician of more than \$10,000.

The whistleblower alleged other irregularities involving the hospital company's claims of tax exemption as to property underlying both that MOB and a second building, thereby resulting in hundreds of thousands of dollars in annual savings for the physician tenants.

The whistleblower's claim is that those savings support Stark and AKS violations, thus forming the basis for liability under the FCA.

Hospital Argues "No Evidence of Any Claim"

The hospital company defendant moved to dismiss the case. It argued that the whistleblower did not meet the requirement that he plead with sufficient particularity, because he did not allege any particular fraud, "including a failure to identify a single

UPCOMING WEBINARS

Date: Thu, Sep 3, 2015
Time: 3:00 PM - 4:00 PM PDT
Title: [Update on Deadline to Refund Overpayments To Avoid Draconian Penalties](#)

Topic: Overview of a recent federal court case dealing with the remittance of "reverse false claims" as stipulated by the False Claims Act (FCA) and what it means for physicians, facilities and other providers.

Date: Thu, Oct 15, 2015
Time: 3:00 PM - 4:00 PM PDT
Title: [How to Profit From Telemedicine And Related Technology In Texas](#)

Topic: Telemedicine. It's the future and it's arrived no matter what the Medical Board rules or the courts do in any particular case. Your patients will demand it either way. If not from you, then from someone else. You can either fear it or you can profit from it.

Hospital-Based Medical Group Mergers, Acquisitions & Alternatives



COMPLIMENTARY BOOK DOWNLOAD

Some days, it seems as if everyone, from anesthesia groups to vascular surgery practices, is talking about selling their practice to a larger group, to private equity investors, or to a hospital.

The reality is that some practices can be sold, some can never be sold, and some have nothing to sell.

The reality also is that there are a number of strategic alternatives to a practice sale.

A perfect storm of factors is accelerating the market for hospital-based medical group mergers and acquisitions.

[Download Here>](#)

allegedly false statement, record or claim that was made or submitted to or paid by any government entity as a result of the schemes [the whistleblower] has devised based on what appears to be little more than his review of a publicly recorded summary of a ground lease."

The whistleblower argued that unlike the fraud alleged in many FCA actions, the fraud he alleged is not dependent on the particularized billing content of any given claim. Instead, it was a question, on a case by case basis, of whether he provided some indicia of reliability to support the allegation of an actual false claim for payment.

The court agreed with the whistleblower's argument. On August 14, 2015, it denied the motion to dismiss. The case is moving forward toward trial.

Essentially, the whistleblower wove the story of the underlying lease-related arrangements with public information from CMS and with the names of the tenant-physicians and their aggregate number of Medicare referrals. He argued that the improper relationships taint every claim submitted as a result of their referrals.

Lessons for You

1. As healthcare fraud is becoming an industry so too is the whistleblower business. The crowd expects that whistleblowers come from the inside because of the need to plead with particularity. Yet this federal trial court held that describing a systemic scheme with particularity meets the pleading burden. As a result, people on the outside, for example, the real estate appraiser mentioned above, can launch their own investigations and become whistleblowers.

2. It's impossible to completely describe the range of underlying, indirect improprieties that can be seen as supporting violations of Stark and the AKS. Here, for example, lower parking expenses are seen as resulting in lower development and operating costs which are seen as leading to lower rent charged to physicians for hospital campus office space, which is seen as a financial incentive to those physicians for their referrals to the hospital.

Yes, the situation described is at the trial court level and no one can be certain what will happen in the end or if the case will settle or go on to an appeal. Yet, that's little comfort to the hospital which is probably spending hundreds of thousands of dollars, perhaps each month, on its defense and which will probably spend tens if not hundreds of millions on a settlement.

You can no longer look at these possibilities as hot air. The air is really steam and it's blowing a whistle. Is it blowing towards you?

Wisdom. Applied. 80 - Flying First Class Medical Care

Although airlines have a lot to learn about customer service, they do serve as a model for pricing strategy in healthcare.



Directions: Clarity For Medical Group Leaders



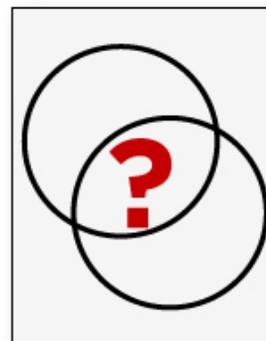
COMPLIMENTARY BOOK DOWNLOAD

The healthcare market is changing rapidly, bringing new sets of problems.

How can you find a solution, how can you engage in the right development of strategy, and how can you plan your, or your group's, future without tools to help clarify your thinking?

Directions is a collection of thoughts as thinking tools, each intended to instruct, inform, and even more so, cause you to give pause to instruct and inform yourself.

[Download Here >](#)



MFW Knowledge Products

If you're an independent learner or need a refresher on a current topic, click [here](#) to find out about our growing list of Knowledge Products.

Recent Interviews and Published Articles

Mark's article **Anesthesia Group Mergers, Acquisitions and (Importantly) Alternatives** was published in the summer 2015 volume of [Communique](#). Read or download [here](#).

Mark was quoted in the article **Anesthesiology Acquisition Rate Still at Fevered Pace**, published in the July 2015 issue of [Anesthesiology News](#). Read or download [here](#).

Mark's article **Seeking Certainty In Radiology: Mergers, Acquisitions and Alternatives** was published in June 2015 on [Imagingbiz.com](#). Read or download [here](#).

Mark's article **Give Disruptive Docs the Boot** was published in the April 2015 issue of [Outpatient Surgery](#). Read or download [here](#).

Mark's article **Do You Make This Mistake Concerning Customer Value?** was published in the April 2015 issue of [Anesthesiology News](#). Read or download [here](#).

Mark's article **Do You Make This Mistake Concerning Customer Value?** was published in the March 2015 issue of [General Surgery News](#). Read or download [here](#).

Mark's article **McDonald's and Delivering Anesthesia Group Value** was published on [AnesthesiologyNews.com](#) 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](#).

All Things Personal

I saw the giant tortoises at the zoo. From hatchling to hundreds of pounds over a lifespan of 100 years or more.

But it's their shells that fascinate.

When a tortoise pulls its body into its shell, it's protected from predators. On the other hand, it's got to stick its neck and legs out if it's going to make any forward progress.

It's a perfect metaphor for your business, whether it's a medical practice, pharmacy, DME supplier or facility.

Sure, you need to protect your investment and you shouldn't shortchange efforts in that regard. But, no matter what your current size, you're not going to be able to move forward unless you are willing to move beyond your comfort zone and into the risky world. That includes spending money, investing in yourself.

I often hear the same laments: that we "can't do that" or that "it costs too much" or that "it's not the right time." Of course, those who say such things are simply fooling themselves. They've pulled their neck, their legs and tail into their shells and there they will stay.

Not with a bang but a whimper.

Recently Published Blog Posts

Monday, August 24

[Audit Medical Group and Physician-Owned Facility Deals In Light of Tomorrow \(and Today\)](#)

Thursday, August 20

[Why A 59 Year Old Deli Is a Case Study For Your Medical Practice](#)

Wednesday, August 19

[Do You Make This Mistake In Business?](#)

Tuesday, August 18

[Control The Document To Control The Deal](#)

Monday, August 17

[Hospital Turns \\$1 Million Of Collections Into \\$24 Million Of Potential False Claims Act Liability](#)

Thursday, August 13

[Same Company. Two Different Experiences. One Big Failure](#)

[More>>>](#)

Mark F. Weiss
The Mark F. Weiss Law Firm, a Professional Corporation
(Formerly known as Advisory Law Group, a Professional Corporation)
markweiss@advisorylawgroup.com

[Twitter](#)
[Facebook](#)

SANTA BARBARA OFFICE:
1227 De La Vina Street
Santa Barbara, CA 93101
Tel: 805 695 8107

LOS ANGELES OFFICE:
10940 Wilshire Boulevard
16th Floor
Los Angeles, CA 90024
Tel: 310 843 2800

3/5/2019

Strange Whistleblower Case With Lessons For All

DALLAS OFFICE:
One Galleria Tower
13355 Noel Rd., Suite 1700
Dallas, TX 75240
Tel: 972 392 9200

Fax (all locations): 877 883 0099
www.advisorylawgroup.com

Read Mark Weiss' blog, "Wisdom. Applied." at www.advisorylawgroup.com/blog1
Sign up for our complementary email newsletter, Advisory E-Alert, at www.advisorylawgroup.com

THIS EMAIL IS INTENDED ONLY FOR THE PERSON OR PERSONS TO WHOM IT IS ADDRESSED. IF YOU ARE NOT AN INTENDED RECIPIENT, PLEASE CONTACT MARKWEISS@ADVISORYLAWGROUP.COM IMMEDIATELY. This email may contain confidential and/or privileged information protected under applicable law which may be exempt from disclosure. If you are not an intended recipient or are not the person who is responsible for delivering the message to an intended recipient, please note that any distribution, copying or other dissemination of this email is absolutely prohibited.
© 2015 The Mark F. Weiss Law Firm, A Professional Corporation

If you no longer wish to receive our emails, click the link below:

[Unsubscribe](#)
The Mark F. Weiss Law Firm 1227 De La Vina St. Santa Barbara, California 93101 United States (310) 843-2800

