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FMV DOCUMENTATION AND REAL ESTATE COMPLIANCE – OFTEN OVERLOOKED, BUT NEVER UNDERVALUED

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A recent ruling by the U.S. Court of Appeals for the Eleventh Circuit may put new focus on the importance of documenting fair market value (“FMV”) in transactions between healthcare referral sources, including transactions between physicians and health systems. In *Thomas Bingham v. HCA, Inc. (No. 16-17059 (11th Cir. 2019))*, Bingham alleged that among other things, HCA Healthcare (“HCA”) violated the federal Anti-Kickback Statute (the “AKS”), the Stark Law, and Federal False Claims Act through arrangements involving receipt of non-FMV rent through “sweetheart deals to physician tenants who leased space in medical office buildings (“MOB”) developed by HCA in exchange for patient referrals from those physicians.” On July 31, 2019, the Eleventh Circuit Court of Appeals ruled in favor of HCA, affirming the district court’s grant of judgment in favor of HCA. FMV documentation was a key focus in the decision.

One of the allegations brought forth by Bingham was in reference to the development of a new MOB involving Centerpoint Medical Center in Independence, MO. To develop the MOB, HCA hired a third-party developer, Tegra Independence Medical Surgical, L.C. (“Tegra”), while separately engaging an independent appraiser to determine the FMV of the rental lease terms. Bingham claimed that HCA provided subsidies to Tegra, which the developers passed on to the physician tenants to provide benefits in the form of free office improvements, low initial lease rates, restricted use waivers, and cash flow participation agreements for physician tenants signing a ten-year lease. In turn, Bingham alleged HCA received \$260 million in Medicare and Medicaid payments in the form of patient referrals due to the benefits provided. Bingham alleged that HCA violated the AKS which prohibits remuneration in exchange for services payable by a federal healthcare program.

For a violation to the AKS to take place, there must be remuneration offered or paid at the transaction in place. With respect to healthcare business transactions, the Eleventh Circuit found that remuneration “can only be quantified by reference to its fair market value.” While HCA’s third-party appraisal showed rental rates were at the low end of fair market value, the Court concluded that Bingham failed to demonstrate that HCA provided benefits in excess of FMV for either the relatively low rental rates or space improvements. Among the factors considered in the Court’s affirmation of the original summary judgment were the HCA-obtained appraisals of market rents for the arrangements in question which contributed to its conclusion that “Relator has not shown that HCA conveyed any remuneration to physician tenants of the Centerpoint MOB, and therefore that Relator’s AKS claim fails on summary judgment.”

Additional claims addressed in the appeal by Bingham related to another HCA MOB in Aventura, FL. Included were allegations that incentives were offered and paid to referring physicians to maintain and/



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or relocate their offices to Aventura Hospital in order to safeguard the referrals from the physicians to the HCA hospital. The Court found that Bingham's characterizations of the terms of the ground leases (e.g., "did not reflect fair market value", are "grossly undervalued", or include "overly generous terms") were not justified by Bingham's own calculations regarding the value of the land offered as support. To this end, the Court stated, "Relator does not state with any particularity how HCA conveyed remuneration directly or indirectly to specific tenants of the Aventura MOB...Similarly, Relator's allegations that leases entered into between HCA and Greenfield did not reflect fair market value are supported, if at all, only by Relator's own calculations regarding the value of the land." As the claims were based on "information and belief" rather than specific details or evidence, the Court agreed with the original dismissal finding that the allegations did not meet the heightened pleading standard of Rule 9(b) of the False Claims Act which requires a claim of fraud or mistake be stated with particularity.

Ultimately, the Eleventh Circuit's decision in *Bingham v. HCA* highlights the importance of FMV documentation in False Claims Act cases, including and significantly those based on alleged violations of the AKS.

