

## UPMC Settles Stark Law Case

On May 9, 2024, the University of Pittsburgh Medical Center (UPMC), a large nonprofit healthcare system that owns a number of hospitals, medical practices, and other subsidiaries, announced that they would pay \$38 million to settle a longstanding Stark Law case which had triggered a violation of the False Claims Act (FCA).<sup>1</sup> The lawsuit claimed that several of UPMC's surgeons ordered complex and unnecessary procedures to increase their earnings.<sup>2</sup> This Health Capital Topics article will discuss the UPMC settlement and the allegations underlying the case.

The Stark Law prohibits physicians from referring Medicare patients to entities with which the physicians or their family members have a financial relationship for the provision of designated health services (DHS).<sup>3</sup> Further, when a prohibited referral occurs, entities may not bill for services resulting from the prohibited referral.<sup>4</sup> Under the Stark Law, DHS include, but are not limited to, the following:

- (1) Inpatient and outpatient hospital services;
- (2) Radiology and certain other imaging services;
- (3) Radiation therapy services and supplies;
- (4) Certain therapy services, such as physical therapy;
- (5) Durable medical equipment; and,
- (6) Outpatient prescription drugs.<sup>5</sup>

Civil penalties under the Stark Law include overpayment or refund obligations, a potential civil monetary penalty of \$15,000 for each service, or up to \$100,000 per arrangement or scheme, and exclusion from Medicare and Medicaid programs.<sup>6</sup> Further, violation of the Stark Law can trigger a violation of the False Claims Act (FCA).<sup>7</sup> The FCA prohibits any person from knowingly submitting, or causing to submit, false claims to the government.<sup>8</sup> FCA violators are liable for treble damages (i.e., "three times the government damages"), as well as for a penalty linked to inflation.<sup>9</sup> Not only does the FCA give the U.S. government the ability to pursue fraud, it also enables private citizens to file suit on behalf of the federal government through what is known as a "*qui tam*," "*whistleblower*," or "*relator*" suit.<sup>10</sup>

The lawsuit against UPMC was originally filed on behalf of three UPMC-employed medical professionals, J. William Bookwalter, a neurosurgeon, Robert Sclabassi, a neurophysiologist, and Ann Miltina, a surgical technologist.<sup>11</sup> The three plaintiffs had alleged that

UPMC incentivized neurosurgeons to perform their surgeries at UPMC's facilities in order to increase the revenue received from the government.<sup>12</sup> In return, the physicians were rewarded with compensation that was above *fair market value*.<sup>13</sup> The suit also alleged that some UPMC neurosurgeons had submitted claims for assisting with procedures which they did not directly supervise, perform, or assist.<sup>14</sup> UPMC had previously claimed that the compensation packages which were offered to physicians, including bonuses for productivity, were all the industry standard.<sup>15</sup>

In 2016, UPMC settled a portion of the claims for \$2.5 million, but the federal government had declined to intervene on the rest of the allegations which were brought forth by the plaintiffs.<sup>16</sup> In 2019, after the plaintiffs continued to pursue their claims which were not addressed by the settlement in 2016, an appeal was granted after a district court had previously dismissed the plaintiffs' claims.<sup>17</sup> The Third Circuit Court of Appeals had reversed the decision of the district court, denied the motion to dismiss which was filed by defendants, and ordered the *qui tam* action to proceed to the discovery phase of the lawsuit.<sup>18</sup>

In a statement, UPMC's Chief Communications Officer and Vice President Paul Wood stated that the healthcare system was "pleased to have resolved this matter, twelve years after it first started. The settlement, which includes no admission of liability, allows UPMC to keep its focus where it belongs—on providing world-class care to our patients."<sup>19</sup> The firms representing the plaintiffs said that "this kind of recovery would simply be impossible without the bravery and commitment of whistleblowers willing to incur enormous risk to do the right thing on behalf of the taxpayers."<sup>20</sup> Mark Simpson, founder of the Simpson Law Firm, stated that "The Stark Law was enacted to ensure that the clinical judgment of physicians is not corrupted by improper financial incentives."<sup>21</sup>

As an agreement of the settlement, UPMC will be allowed to deny all allegations of any wrongdoing.<sup>22</sup> The three professionals each will receive \$11 million, and the rest of the settlement amount (\$27 million) will be paid out to the federal government.<sup>23</sup> The amount that the plaintiffs receive is a reward for whistleblowers that alert the government of fraudulent practices.<sup>24</sup> The \$38 million settlement is believed to be one of the largest recoveries in a False Claims Act case where the U.S. declined to intervene.<sup>25</sup>

- 1 “UPMC pays \$38M to settle 12-year-old whistleblower case” By Dave Muoio, Fierce Healthcare, May 13, 2024, <https://www.fiercehealthcare.com/providers/upmc-pays-38m-settle-12-year-old-whistleblower-case> (Accessed 5/15/24); “United States of America ex rel. J. William Bookwalter, III, MD, et al. v. UPMC, et al.” No. 18-1693 (3rd Cir. Sept. 17, 2019), p. 7.
- 2 “University of Pittsburgh Medical Center Settles Whistleblower Lawsuit for \$38m” By Ryan Farrick, Legal Reader, May 10, 2024, <https://www.legalreader.com/upmc-pittsburgh-whistleblower-lawsuit-settlement/> (Accessed 5/15/24).
- 3 “CRS Report for Congress: Medicare: Physician Self-Referral (“Stark I and II”)” By Jennifer O’Sullivan, Congressional Research Service, The Library of Congress, July 27, 2004, available at: <http://www.policyarchive.org/handle/10207/bitstreams/2137.pdf> (Accessed 5/15/24); “Limitation on certain physician referrals” 42 U.S.C. § 1395nn.
- 4 “Limitation on certain physician referrals” 42 U.S.C. § 1395nn(a)(1)(A).
- 5 “Limitation on Certain Physician Referrals” 42 U.S.C. § 1395nn(a)(1)(B); “Definitions” 42 C.F.R. § 411.351 (2015). Note the distinction in 42 C.F.R. § 411.351 regarding what services are included as DHS: “Except as otherwise noted in this subpart, the term ‘designated health services’ or DHS means only DHS payable, in whole or in part, by Medicare. DHS do not include services that are reimbursed by Medicare as part of a composite rate (for example, SNF Part A payments or ASC services identified at §416.164(a)), except to the extent that services listed in paragraphs (1)(i) through (1)(x) of this definition are themselves payable through a composite rate (for example, all services provided as home health services or inpatient and outpatient hospital services are DHS).”
- 6 “Limitation on certain physician referrals” 42 U.S.C. § 1395nn(g).
- 7 “Comparison of the Anti-Kickback Statute and Stark Law” Health Care Fraud Prevention and Enforcement Action Team (HEAT) Office of Inspector General (OIG), <https://oig.hhs.gov/documents/provider-compliance-training/939/StarkandAKSChartHandout508.pdf> (Accessed 5/15/24).
- 8 “The False Claims Act” U.S. Department of Justice, February 2, 2022, <https://www.justice.gov/civil/false-claims-act> (Accessed 5/15/24).
- 9 *Ibid.*
- 10 *Ibid.*
- 11 Farrick, Legal Reader, May 10, 2024.
- 12 Muoio, Fierce Healthcare, May 13, 2024.
- 13 *Ibid.*
- 14 “What to know about UPMC’s \$38M Stark law settlement” By Patsy Newitt, Becker’s ASC Review, May 13, 2024, [https://www.beckersasc.com/asc-news/what-to-know-about-upmcs-38m-stark-law-settlement.html?origin=SpineE&utm\\_source=SpineE&utm\\_medium=email&utm\\_content=newsletter&oly\\_enc\\_id=9207F7402078E2D](https://www.beckersasc.com/asc-news/what-to-know-about-upmcs-38m-stark-law-settlement.html?origin=SpineE&utm_source=SpineE&utm_medium=email&utm_content=newsletter&oly_enc_id=9207F7402078E2D) (Accessed 5/16/24).
- 15 Muoio, Fierce Healthcare, May 13, 2024.
- 16 *Ibid.*
- 17 *Ibid.*
- 18 “Practice Loss Postulate Perpetuated by Third Circuit” By Jessica Bailey-Wheaton and Todd Zigrang, Health Capital Consultants, [https://www.healthcapital.com/hcc/newsletter/10\\_19/HTMLUPMC/convert\\_upmc-case-topics-article-10.31.19.php](https://www.healthcapital.com/hcc/newsletter/10_19/HTMLUPMC/convert_upmc-case-topics-article-10.31.19.php) (Accessed 5/15/24).
- 19 Muoio, Fierce Healthcare, May 13, 2024.
- 20 Verkamp, May 9, 2024.
- 21 Farrick, Legal Reader, May 10, 2024.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 “UPMC settles \$38M whistleblower lawsuit for Medicare fraud” By Chad Van Alstin, HealthExec, May 10, 2024, <https://healthexec.com/topics/healthcare-management/legal-news/upmc-settles-38m-whistleblower-lawsuit-medicare-fraud> (Accessed 5/15/24).
- 25 Verkamp, May 9, 2024.

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Mr. Zigrang is the co-author of *"The Adviser's Guide to Healthcare - 2nd Edition"* [AICPA - 2015], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Guide to Valuing Physician Compensation and Healthcare Service Arrangements* (BVR/AHLA); *The Accountant's Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies*; *Business Appraisal Practice*; and, *NACVA QuickRead*. Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); the American Health Lawyers Association (AHLA); the American Bar Association (ABA); the Association of International Certified Professional Accountants (AICPA); the Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

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