



## DOJ Intervenes in Fraud & Abuse Case Against Tennessee Hospital

On July 26, 2024, the U.S. Department of Justice (DOJ) filed a complaint in intervention against Murphy Medical Center, doing business as Erlanger Western Carolina Hospital, and Chattanooga-Hamilton County Hospital Authority, doing business as the Erlanger Health System and Erlanger Medical Center.<sup>1</sup> The government's complaint, filed in the U.S. District Court for the Western District of North Carolina, alleges that Erlanger violated the Stark Law, and subsequently submitted false claims to the Medicare program in violation of the False Claims Act (FCA).<sup>2</sup> This Health Capital Topics article reviews 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> 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>4</sup>

Civil penalties under the Stark Law include overpayment or refund obligations, a potential 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>5</sup> Further, violation of the Stark Law can trigger a violation of the FCA, which prohibits any person from knowingly submitting, or causing to submit, false claims to the government.<sup>6</sup> FCA violators are liable for treble damages (i.e., "three times the government damages"), as well as a monetary penalty linked to inflation.<sup>7</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>8</sup> This lawsuit was originally filed under the *qui tam* provisions of the FCA.<sup>9</sup>

Chattanooga-Hamilton County Hospital Authority is a public, tax-exempt organization that owned, controlled, and operated several hospitals in Chattanooga, Tennessee from 2014 to 2021.<sup>10</sup> Murphy Medical Center, Inc. is a non-profit corporation located in Cherokee County, North Carolina.<sup>11</sup> In April 2018, the Chattanooga-

Hamilton County Hospital became the sole member of Murphy Medical Center Inc., which became a part of the seven-hospital Erlanger Health System (Erlanger).<sup>12</sup>

In 2005, Erlanger agreed to pay \$40 million to resolve allegations that they had knowingly submitted false claims to Medicare.<sup>13</sup> As part of the settlement, Erlanger entered into a Corporate Integrity Agreement (CIA) with the Department of Health & Human Services' (HHS) Office of Inspector General (OIG).<sup>14</sup> The CIA, which was in effect from October 2005 through 2010, required Erlanger to establish controls to ensure financial relationships with their physicians did not violate the Stark Law.<sup>15</sup> After the CIA expired, Erlanger allegedly began implementing a strategy to increase profits by employing more physicians and generating downstream revenue.<sup>16</sup> In furtherance of this strategy, the system removed oversight and controls on physician compensation in 2013, leading to the activity alleged in this complaint, through at least 2021.<sup>17</sup>

The government alleges that:

- (1) Erlanger knew compensation to physician employees must be consistent with Fair Market Value (FMV) to qualify for a Stark Law exception;
- (2) Beginning in 2014, Erlanger employed more physicians to secure downstream revenue, growing from 140 physicians in 2014 to 380 by 2018;
- (3) Erlanger eliminated or relaxed physician compensation oversight in order to retain and recruit more physicians with downstream revenue potential;
- (4) Erlanger changed its compensation model to include larger salaries for academic and medical director positions;
- (5) Erlanger physicians who generated downstream revenue were some of the highest paid physicians in the U.S.;
- (6) Erlanger dismissed concerns that it was paying employed physicians more than they were collecting for physician services due to the downstream profitability;
- (7) Erlanger disregarded concerns related to quality of care and overutilization bearing on the FMV of compensation to a cardiothoracic surgeon;

- (8) Erlanger disregarded warnings in FMV assessments despite knowing that these opinions stated that physician compensation would exceed 75th or 90th percentile; and
- (9) Erlanger resisted their chief compliance officer's efforts to engage a consultant to review their employed physicians' compensation.<sup>18</sup>

The investigation into Erlanger began after a whistleblower (relator) complaint was filed by that (former) chief compliance officer and a former chief financial officer.<sup>19</sup> The complaint was investigated by the DOJ with assistance from OIG.<sup>20</sup> The DOJ decided to intervene in part of the action against Erlanger, but declined to intervene in the other part of the complaint,<sup>21</sup>

i.e., FCA violations arising from allegedly unlawful referrals from physicians who were not employed by Erlanger.<sup>22</sup> The whistleblowers subsequently informed the court that they would proceed with those non-intervened claims, but would drop other non-intervened claims related to unread test results.<sup>23</sup>

The relators' attorney expects that Erlanger could be liable for up to \$70 million if the lawsuit is successful.<sup>24</sup> The DOJ stated in its announcement of the complaint filing that "improper financial relationships between hospitals and physicians threaten the integrity of clinical decision-making and can influence the type and amount of health care that is provided to patients."<sup>25</sup>

1 "United States Files False Claims Act Complaint Against Erlanger Health System" Office of Public Affairs, U.S. Department of Justice, July 26, 2024, <https://www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-erlanger-health-system> (Accessed 7/30/24).

2 *Ibid.*

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 1/3/24); "Limitation on certain physician referrals" 42 U.S.C. § 1395nn.

4 "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)."

5 "Limitation on certain physician referrals" 42 U.S.C. § 1395nn(g).

6 "The False Claims Act" U.S. Department of Justice, February 2, 2022, <https://www.justice.gov/civil/false-claims-act> (Accessed 1/3/24).

7 *Ibid.*

8 *Ibid.*

9 Office of Public Affairs, U.S. Department of Justice, July 26, 2024.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 "Ex-Erlanger executives allege kickbacks in whistleblower lawsuit" By Kelly Gooch, Becker's Hospital Review, May 28, 2024, <https://www.beckershospitalreview.com/legal-regulatory-issues/ex-erlanger-executives-allege-kickbacks-in-whistleblower-lawsuit.html> (Accessed 7/31/24).

20 Office of Public Affairs, U.S. Department of Justice, July 26, 2024.

21 "The United States of America et al., v. Murphy Medical Center Inc. et al." 1:21-CV-219-MR-WCM, The United States' Notice of Election to Intervene in Part and to Decline to Intervene in Part (W.D. NC April 26, 2024).

22 "The United States of America et al., v. Murphy Medical Center Inc. et al." No. 1:21-cv-00219-MR-WCM, p. 1-4 (NC, 2024).

23 *Ibid.*

24 Gooch, Becker's Hospital Review, May 28, 2024.

25 Office of Public Affairs, U.S. Department of Justice, July 26, 2024.



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Jessica L. Bailey-Wheaton, Esq., is Senior Vice President and General Counsel of HCC. Her work focuses on the areas of Certificate of Need (CON) preparation and consulting, as well as project management and consulting services related to the impact of both federal and state regulations on healthcare transactions. In that role, Ms. Bailey-Wheaton provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services.



Additionally, Ms. Bailey-Wheaton heads HCC's CON and regulatory consulting service line. In this role, she prepares CON applications, including providing services such as: health planning; researching, developing, documenting, and reporting the market utilization demand and "need" for the proposed services in the subject market service area(s); researching and assisting legal counsel in meeting regulatory requirements relating to licensing and CON application development; and, providing any requested support services required in litigation challenging rules or decisions promulgated by a state agency. Ms. Bailey-Wheaton has also been engaged by both state government agencies and CON applicants to conduct an independent review of one or more CON applications and provide opinions on a variety of areas related to healthcare planning. She has been certified as an expert in healthcare planning in the State of Alabama.

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