CLIENT ALERTS & INSIGHTS

Whistleblower Lawsuit Against Fresenius Alleges Unlawful Arrangements with Hospitals and Nephrologists Intended to Induce Dialysis Referrals

FEBRUARY 15, 2021

Authors: Jason S. Greis, Scott P. Downing, Mark J. Silberman, Juan Morado Jr.

On February 5, 2021 a long-time former Fresenius Medical Care North America ("Fresenius") employee, Martin Flanagan, filed a qui tam relator amended complaint ("Complaint") against Fresenius alleging that the company had entered into arrangements with hospitals and physicians in order to secure dialysis patient referrals for Fresenius outpatient dialysis clinics, and that such arrangements violated the Federal False Claims Act ("FCA") and the Federal Anti-Kickback Statute ("AKS").

The complaint provides a detailed account of Fresenius' acute care dialysis management business and alleges that it systematically used acute care dialysis management contracts with hospitals as loss leaders to secure patient referrals for Fresenius outpatient dialysis centers in violation of the FCA and AKS. Fresenius also allegedly provided free discharge planning services and in-service training to hospitals. The plaintiff further recounts various instances where Fresenius leadership was questioned about the fair market value of such relationships and the company's alleged failure to enforce annual contractual rate increases. The complaint describes a culture of doing whatever it takes to enter into hospital contracts to secure patient referrals for Fresenius' outpatient dialysis centers.

The complaint also alleges that Fresenius regularly entered into a variety of problematic arrangements with nephrologists and nephrology group practices intended to secure patient referrals for Fresenius' wholly-owned and joint venture outpatient dialysis centers, including:

1. medical director agreements that compensated physicians in excess of fair market value and contained "sticks and carrots," in the form of onerous non-competition covenants and medical directorship rights of first refusal to provide medical director services at other centers;
2. non-fair market value joint venture arrangements that allegedly did not comply with applicable fraud and abuse safe harbors, both because physician referral sources often held more than a 40% equity interest in such centers and because they were offered equity in such centers at less than fair market value. These arrangements allegedly also used long-term non-competition covenants to lock in patient referrals for the centers;
3. non-fair market value space leases for dialysis centers where there was a landlord physician referral source; and

4. free or discounted physician practice alignment services, including providing dedicated chronic kidney disease educator services, financial coordination services for patients beginning dialysis, vascular access development services and assistance with physician recruiting through Fresenius' online recruiting platform.

Many of the allegations contained in the Complaint of inappropriate physician arrangements are similar, in many regards, to the allegations contained in whistleblower David Barbetta's complaint filed against DaVita in federal district court in 2009. DaVita settled that case in October 2014 by entering into a Corporate Integrity Agreement ("CIA") with the Office of Counsel to the Inspector General of the Department of Health and Human Services. The settlement required DaVita to repay a total of $400 million to the federal government and various states, and the CIA that it entered into with the government impacted various aspects of DaVita's business operations.

A variety of hospitals, nephrologists and nephrology group practices have been specifically identified in the Complaint. Benesch's healthcare+ attorneys have significant experience representing nephrology group practices and dialysis organization in governmental fraud and abuse investigations. Please contact one of the below authors if you have questions about the lawsuit and its implications for the nephrology and dialysis industry.

Please contact one of the authors below or a member of the Benesch Healthcare+ Practice Group if you have questions regarding information contained in this Client Alert.

Jason S. Greis at 312.624.6412 or jgreis@beneschlaw.com.

Scott Downing at 312.624.6326 or sdowning@beneschlaw.com

Mark Silberman at 312.212.4952 or msilberman@beneschlaw.com

Juan Morado Jr. at 312.212.4967 or jmorado@beneschlaw.com