

March 7, 2022

RECENT SETTLEMENT INDICATES DONATIONS BY HEALTHCARE ENTITIES COULD BE SUBJECT TO INCREASED DOJ SCRUTINY

To Our Clients and Friends:

On February 14, 2022, the Department of Justice and U.S. Attorney's Office for the Middle District of Florida announced they had reached a \$5.5 million settlement with NCH Healthcare System ("NCH") to resolve common law claims arising from NCH's donations to local government entities—payments that the government alleged were used improperly to fund Florida's share of Medicaid payments made to NCH.

NCH is a non-profit entity that operates two hospitals in Collier County, Florida. The government alleged that between October 2014 and September 2105, NCH provided free nursing and athletic training services to the Collier County School Board and paid other financial obligations on behalf of Collier County.[1] Under the government's theory, these donations were designed to artificially increase Medicaid payments made to NCH without any corresponding expenditure of state or local funds on health care. Instead, the donations allowed the county and its local school board to avoid various expenditures, which left funds available to be paid to the State of Florida as its share of Medicaid payments owed to NCH. Under federal law, specifically 42 U.S.C. § 1396b(w)(2)(B), Florida's share of Medicaid payments must consist of state or local government funds, and not "non-bona fide donations" from private health care providers. A non-bona fide donation triggers a corresponding federal expenditure for the federal share of Medicaid without any corresponding increase in state expenditures. This is prohibited by law to ensure that states pay their required share of Medicaid payments and are incentivized to prevent fraud, waste, and abuse in their Medicaid programs.[2]

Notably, the NCH settlement agreement released only common law claims of mistake and unjust enrichment, and the United States expressly reserved its rights to later bring claims under the False Claims Act ("FCA") and other laws.[3] Of the \$5.5 million settlement payment, just under \$5 million was designated as "restitution" for tax purposes—suggesting that the parties agreed that NCH would pay a multiple of 1.1 times single damages, notwithstanding that the United States is limited to recovering single damages under common law theories.[4] By comparison, DOJ policy is to compromise False Claims Act claims for no less than double damages, with exceptions to go lower where the defendant demonstrates substantial cooperation with the government's investigation. While it's not necessarily the case that the narrow release in this case means that there will ultimately be subsequent FCA litigation, it does highlight that DOJ may be willing to pursue and settle cases involving potential allegations of health care fraud for less than double damages based on so-called "innocent" overpayments—albeit without an FCA release—where evidence of scienter may fail to meet the threshold for a viable FCA case.[5] Further, NCH agreed to fully cooperate with the government's investigation of other potential defendants, including its officers and employees, and to provide the United States with all relevant non-privileged documents, including reports and interview memoranda, relating to the alleged conduct.[6]

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The NCH settlement also signals that in-kind and monetary donations made to state and local entities may be at an increased risk of scrutiny by the Department of Justice. The NHS settlement comes amidst ongoing investigations and settlements involving donations made by pharmaceutical manufacturers to purportedly independent foundations and patient assistance programs, and could signal that the government might infer bad intent from a broader array of donations made by healthcare entities. Clearly, the government will not shy away from pursuing transactions under the fraud and abuse laws that it believes run afoul of regulatory requirements, even if such transactions confer public benefit. In light of these heightened risks, clients are advised to carefully scrutinize their donation practices, whether monetary or in-kind.

[1] NCH Healthcare Settlement Agreement, Office of Pub. Affairs, U.S. Dep’t of Justice (Feb. 14, 2022) at recital B, <https://www.justice.gov/opa/press-release/file/1471946/download>; *see also* Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Florida’s NCH Healthcare System Agrees to Pay \$55 Million to Settle Common Law Allegations (Feb. 14, 2022), <https://www.justice.gov/opa/pr/florida-s-nch-healthcare-system-agrees-pay-55-million-settle-common-law-allegations>.

[2] The federal government provides partial funding for state Medicaid programs through Federal Financial Participation (“FFP”) funding. 42 C.F.R. § 431.958. The amount of FFP funds each state is eligible for is based on the state’s own Medicaid expenditure amount, which may only include state or local government funds. 42 U.S.C. § 1396b(a). Non-bona fide donations from private health care providers, including in-kind services, may not be included in the calculation of the state’s own Medicaid expenditures. *Id.* §§ 1396b(w)(1)(a), (2)(B).

[3] NCH Healthcare Settlement Agreement, *supra* note 1, ¶ 3.

[4] *See, e.g., U.S. ex rel. Robinson-Hill v. Nurses’ Registry & Home Health Corp.*, No. CIV.A. 5:08-145-KKC, 2015 WL 3403054, at *4 (E.D. Ky. May 27, 2015) (“Recovery on a claim for payment by mistake is limited to that portion of the payment in excess of the actual amount owed. Lastly, recovery on a claim for unjust enrichment is limited to the amount of the benefits improperly received by the defendant. Thus, with these common law claims, the United States may recover the amounts wrongfully or erroneously paid to defendants by the Medicare program, but the Government is not entitled to recover any penalties or punitive damages.”) (internal citations omitted).

[5] *See also, e.g., Drakontas LLC Settlement Agreement*, U.S. Atty’s Office for the Eastern Dist. of Pa. (May 3, 2016) at III.C–D, <https://www.justice.gov/usao-edpa/file/849061/download> (releasing only common law breach of contract, payment by mistake, and unjust enrichment claims when DOJ alleged defendant operated a non-compliant accounting system that resulted in the U.S. making improper and excessive payments).

[6] NCH Healthcare Settlement Agreement, *supra* note 1, ¶ 8.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any member of the firm's False Claims Act/Qui Tam Defense, FDA and Health Care, Government Contracts, or White Collar Defense and Investigations practice groups.

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