

The Intermountain Settlement: The Pain of Self-Disclosure

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Intermountain Health Care, Inc. (“Intermountain”), a non-profit, is the largest health system in the state of Utah. It controls 22 hospitals, more than 185 physician clinics, and a health insurance company.¹ It has over 33,000 employees.² The financial summary in its 2011 Annual Report indicates its annual revenues is about \$4.7 billion, and that it has in excess of \$466 million in the bank to meet future needs.³

On April 3, 2013, it entered into a settlement agreement with the United States in which it agreed to pay \$25,500,000 to settle health fraud claims.⁴ The allegations were that it paid bonuses to physicians based on the quantity of referrals made by the physicians and that it failed to enter into leases and personnel contracts as required by the anti-fraud law.⁵ Intermountain’s actions included potential violations of the False Claims Act, 31 U.S.C. §§3729-3733; the Anti-Kickback Statute, 42 U.S.C. §1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§3801-3812; and the Physician Self-Referral Law (Stark), 42 U.S.C. §§1395nn(g)(3) and (4); as well as common law theories of payment by mistake, unjust enrichment, restitution, and fraud.⁶

Intermountain’s Chief Medical Officer Brent Wallace said that a group from Intermountain went to a Stark law conference in 2007, and upon their return began to look into their policies and practices.⁷ After initial investigations indicated there may be problems, Intermountain conducted a more formal yearlong investigation into the contracts among its 22 hospitals and 4,500 doctors.⁸ On August 4, 2009 Intermountain reported the problems it found to the government.⁹

The federal government has two self-disclosure mechanisms, a new one in the Centers for Medicare & Medicaid Services (CMS) for violations of the Stark law,¹⁰ and an older one in the

¹ Intermountain Healthcare Settlement of \$25.5 Million Stems from Stark Law Violations, April 8, 2013, <http://www.arentfox.com/newsroom/alerts/intermountain-healthcare-settlement-255-million-stems-stark-law-violations>.

² Id.

³ Intermountain Health Care, Inc., Annual Report 2011, p. 12, at <http://intermountainhealthcare.org/about/overview/annualreport2011/Pages/home.html>, accessed April 10, 2013.

⁴ The Settlement Agreement itself is available from the Salt Lake Tribune. Kirsten Stewart, Intermountain Healthcare pays \$25.5 million to settle claims allegations, The Salt Lake Tribune (April 3, 2013), at <http://www.sltrib.com/sltrib/news/56100715-78/intermountain-doctors-care-health.html.csp>, accessed April 10, 2013. (hereinafter “AGREEMENT”). It can also be found here: <http://www.modernhealthcare.com/assets/pdf/CH8778043.PDF>.

⁵ AGREEMENT, at 1-2.

⁶ AGREEMENT, at 3.

⁷ Stewart, *supra* note 4.

⁸ Id.

⁹ Id.

¹⁰ This self-disclosure mechanism was mandated in the Patient Protection and Affordable Care Act of 2010. ACMS, Self-Referral Disclosure Protocol, http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Self_Referral_Disclosure_Protocol.html.

Office of Inspector General of the Department of Health & Human Services (OIG-HHS) for the entire panoply of offenses that are construed as health fraud.¹¹ A self-disclosure mechanism was needed that focused on the Stark law because in 2009 the OIG-HHS announced it would be narrowing its focus to violations of the Anti-Kickback Statute.¹² Intermountain's self-disclosure was made to the OIG-HHS since the CMS Self-Disclosure Referral Program was not in existence when it made its disclosure.

The potential violations disclosed by Intermountain could lead to extremely severe penalties for everyone involved, including the some 209 physicians named in the Settlement.¹³ Penalties could include:

- Civil monetary fines; (e.g., up to \$50,000 and treble damages per violation)
- Criminal monetary fines and imprisonment; (e.g., up to \$25,000 and 5 years imprisonment per violation); and
- Exclusion from federal business.

Other burdensome outcomes can arise from qui tam or whistleblower suits, in which the whistleblowers are entitled to damages under the False Claims Act;¹⁴ and corporate integrity agreements, in which the enterprise agrees to strict controls and oversight by the government.¹⁵

Some features of the Settlement

The Settlement recites that Intermountain reported three kinds of potential violations that occurred between 2000 and 2009:

1. It paid 37 physicians under a bonus formula that “may have improperly taken into account the volume and value” of the physicians’ referrals to Intermountain;
2. It rented office space to 18 physicians “without written and executed leases in effect for the entire term and/or where there may have been fair market value issues with the leases;”¹⁶ and
3. It had contractual agreements with 154 physicians that were not properly memorialized to avoid problems under the anti-fraud laws.

As is usual in settlements the identity of those actually listed in the release itself is important. Here, although the Settlement is formally only with Intermountain Health Care, Inc., the release

¹¹ OIG-HHS, Self-Disclosure Information, <http://oig.hhs.gov/compliance/self-disclosure-info/index.asp>.

¹² Letter from Inspector General Daniel R. Levinson, March 24, 2009, at <http://oig.hhs.gov/fraud/docs/openletters/OpenLetter3-24-09.pdf>. The Anti-Kickback Statute is at 42 U.S.C. §1320a-7b.

¹³ There are three lists of physicians named in the Settlement, and some physicians may be on more than one list.

¹⁴ Department of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, at <https://www.doj.gov/docs/falseclaimsact.pdf>. See also, Department of Justice, Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act, United States Attorneys’ Manual §932, at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00932.htm.

¹⁵ See OIG-HHS, Corporate Integrity Agreements, at <http://oig.hhs.gov/compliance/corporate-integrity-agreements/index.asp>.

¹⁶ SETTLEMENT, at 1-2.

also covers its subsidiaries, affiliates, officers, directors, and employees. Notably, the release does not explicitly address the 209 physicians named in the Settlement, all of whom are potentially liable. Only 37 physicians who received potentially improper bonuses are identified as employees, which leaves in question the exposure of the remaining 172 named physicians.

Bruce Reese, vice chairman of Intermountain's Board of Trustees, characterized the alleged violations committed by and with these 172 physicians as "technical."¹⁷ Anti-fraud rules require agreements to contain certain terms, to be for a minimum period of time, and to be signed in advance. A violation of these rules does not necessarily mean the violator is defrauding the government; rather it means the possibility for fraud is heightened. This kind of violation is different than a monetary payment that is linked to patient referrals, the very heart of the kind of activity the government intends to stop.

That being said, about two-thirds of the Settlement amount was from Intermountain's relationship with the 18 physicians with whom it did not have written and executed leases.¹⁸ It had to return to the government "any money that doctors under those leases had billed for treating Medicare patients."¹⁹

Characterization of the Settlement amount is important because Intermountain may be able to deduct some (or all) of it as a business expense. The IRS has rules that permit the deduction of FCA settlement amounts, based in general on the government's intent.²⁰ If the intent was to assess a penalty, then it is not deductible; if the intent was compensatory, then the amount paid is deductible. It is on the taxpayer to prove it is entitled to any deductions.²¹ A rough calculation gives some idea of the seriousness of the Settlement amount. Two-thirds of Settlement amount is about \$16,500,000. This amount is arguably compensatory, and therefore deductible. The remaining \$9,000,000 is thus arguably penalty or fine, an amount that is not deductible. If this is the case, and if each of the 209 violations is given equal weight, then Intermountain is paying about \$43,000 per violation, a very steep penalty.

The Settlement makes it very clear in two separate places that nothing in it "constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws."²² Regardless, given Intermountain's revenues and cash on hand, it is unlikely that the Settlement will impact their operations.

Another important part of the Settlement is the government's agreement to "release and refrain from instituting, directing or maintaining any administrative action against Intermountain seeking exclusion from Medicare, Medicaid, and other Federal health programs."²³ Few health care institutions could survive being excluded from government paid or subsidized health care.

¹⁷ Stewart, at note 4.

¹⁸ Id.

¹⁹ Id.

²⁰ Coordinated Issue - All Industries - False Claims Act Settlements With Department Of Justice (DOJ), IRS.GOV (September 5, 2008), at [http://www.irs.gov/Businesses/Coordinated-Issue---All-Industries---False-Claims-Act-Settlements-With-Department-Of-Justice-\(DOJ\)](http://www.irs.gov/Businesses/Coordinated-Issue---All-Industries---False-Claims-Act-Settlements-With-Department-Of-Justice-(DOJ)), accessed April 10, 2013.

²¹ Id.

²² SETTLEMENT ¶¶5 & 4a.

²³ Id., at 3. (¶3)

The threat of this sanction must have been used in the negotiations because it is explicitly waived in consideration of Intermountain's self-disclosure, payment and other obligations.

The Settlement did not include a corporate integrity agreement (CIA). The government typically includes corporate integrity agreements as part of settlements like these to insure the settling institution changes its standards to avoid violations going forward. Typical CIAs last 5 years and "include requirements to"

- hire a compliance officer/appoint a compliance committee;
- develop written standards and policies;
- implement a comprehensive employee training program;
- retain an independent review organization to conduct annual reviews;
- establish a confidential disclosure program;
- restrict employment of ineligible persons;
- report overpayments, reportable events, and ongoing investigations/legal proceedings; and
- provide an implementation report and annual reports to OIG on the status of the entity's compliance activities."²⁴

Avoidance of this sanction is a boon for Intermountain and a signal that the government agreed to some degree with Intermountain's assertion that it is an exemplary health system.²⁵ Intermountain announced in its Statement:

Since discovering these concerns Intermountain has improved its controls by implementing a rigorous centralized process to track all physician agreements. Intermountain added additional staff, implemented advanced tracking software, created oversight councils, and put additional training in place to assure compliance with all relevant regulations. Intermountain will continue the practice of regularly evaluating and monitoring all business practices to ensure legal and regulatory compliance.²⁶

If such controls were in place prior to the Settlement, there would have been no need to include them in the Settlement.

Since 1998, when the OIG-HHS published the Provider Self-Disclosure Protocol, it has resolved over 800 disclosures and recovered in excess of \$280 million for Federal health care programs.²⁷ Since May, 2009, a partnership between the DOJ and DHHS has recovered more than \$10.2

²⁴ See note 15.

²⁵ Intermountain Health System, Inc., Statement Issued by Brent Wallace, MD, Intermountain Healthcare Chief Medical Officer, April 3, 2013, at <http://intermountainhealthcare.org/about/news/Pages/home.aspx?NewsID=1425>.

²⁶ Id.

²⁷ Health & Human Services Department, Solicitation of Information and Recommendations for Revising OIG's Provider Self-Disclosure Protocol, Federal Register, FR Doc. 2012-14585, (6/18/12), at <https://www.federalregister.gov/articles/2012/06/18/2012-14585/solicitation-of-information-and-recommendations-for-revising-oigs-provider-self-disclosure-protocol#p-13>. The Provider Self-Disclosure Protocol was updated April 17, 2013. OIG-HHS, Updated OIG's Provider Self-Disclosure Protocol (April 17, 2013), at <http://oig.hhs.gov/compliance/self-disclosure-info/files/Provider-Self-Disclosure-Protocol.pdf>.

billion in cases such as this against Intermountain.²⁸ The size of the penalties and compensation in the Settlement should function as intended, to “reduce and prevent Medicare and Medicaid financial fraud.”²⁹

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²⁸ Department of Justice Office of Public Affairs, Press Release: Intermountain Health Care Inc. Pays U.S. \$25.5 Million to Settle False Claims Act Allegations (April 3, 2013), at <http://www.justice.gov/opa/pr/2013/April/13-civ-378.html>.

²⁹ Id.