Roy Snell Health Care Regulatory & Compliance Writing Competition

2023 Competition Problem

Introduction – September Sunshine

As Dr. Armand Fontain headed across the parking lot enjoying the unusual mid-September warmth and sunshine, he hoped that life was finally turning around. Having dealt with the death of his beloved younger sister and shrinking government reimbursements for his practice over the last two years, Fountain felt it was high time he got to enjoy the fruits of his labor. Climbing into his new Porsche, he smiled knowing how excited his wife would be to hear that finally they could afford to buy that big waterfront home on Lake of the Isles.

Dr. Fontain is the co-founder of Minneapolis Eastside Oncology, PLLP, a practice that operates three oncology clinics in the Twin Cities. In 2021, after almost a year of negotiations, Eloise Christian Healthcare System (ECH) acquired Eastside. Although the transition was rocky, Dr. Fontain and his co-founder, Dr. Hector Riviera, recently announced at a practice meeting that the practice earned record revenues for the fiscal year ending in August 2022. As a result, Fontain and Riviera told the other oncologists in the practice, that each of them stood make more than twice what they had in the previous year because Eastside was now aligned with ECH and not Minnehaha Health, an ECH competitor.

How to Grow the Bottom Line

ECH operates four hospitals in the Minneapolis-St. Paul area. However, before ECH acquired Eastside, ECH did not have the ability to provide state-of-the-art inpatient oncology services, nor did it operate any outpatient cancer clinics. In addition to normal hospital revenues, ECH operates two Disproportionate Share Hospitals (DSHs) under the government's 340B discount drug program.

Amid the COVID-19 pandemic, ECH's Chief Executive Officer, Ken Bradshaw, and Chief Financial Officer, Jeffrey Fresia, realized that ECH needed a new strategy if it wanted to remain financially viable:

> February 4, 2020
>
> To: Jeff Fresia
>
> From: Ken Bradshaw
>
> Subject: We Must Do Something Now
>
> After that disastrous Board meeting yesterday, we must do something aggressive **right now**, or the Board will hand us our pink slips. I think we can expand our service offerings and increase our 340B revenues (the one major advantage we have in this market) if we look at acquiring a growth-oriented oncology practice. Therefore, I want you to focus on identifying an oncology group we can acquire for a reasonable price. If we do this right, it could be a win-win scenario where we all make a lot of money in these uncertain times.

After surveying the marketplace, Fresia reported back to Bradshaw that he identified Eastside as a potential target:

> February 27, 2020
>
> To: Ken Bradshaw
>
> From: Jeff Fresia
>
> Subject: RE: We Must Do Something Now
>
> Ken, I think I've found us a target that fits the bill. Minneapolis Eastside Oncology, PLLP operates three outpatient oncology clinics, and their outstanding physicians treat approximately 70% of the Twin Cities' cancer patients. Our staff has worked with some of their physicians and are very impressed with their abilities.
>
> However, Eastside acquired significant debt to open the third practice, and its overall revenues have dropped by 30% over the last two years when compared to the other practices in the area. I suspect this is the result of three things:
>
> 1. Declining reimbursements by Medicare. As you know, hospitals, such as us, are entitled to higher Medicare reimbursement than free-standing oncology clinics.
> 2. Everyone has struggled with price gouging by those greedy pharma companies.
> 3. Free-standing clinics can get no price relief by participating in the 340B program.
>
> I've also heard rumors that one of the co-founders, Armand Fontain, has been distracted by the death of his sister. It turns out the Fontain and his sister co-owned Le Jardin, and it seems he has been devoting all his time to keeping the restaurant afloat during the lock-down. Thus, I think we can acquire these folks for a reasonable investment.

Based on Fresia's assessment, ECH began pursuing talks with Eastside in March 2020 to acquire the practice.

Driving a Hard Bargain

Despite Fresia's analysis, negotiations with Eastside did not go smoothly, as both sides had unrealistic expectations. Finally, after months of negotiations, ECH and Eastside agreed to a final purchase arrangement in April 2021. Under the terms of the arrangement, ECH acquired all of Eastside's revenue streams, which included patient fees, and revenue from chemotherapy infusions, oral drugs, radiology, and surgery. Although ECH had engaged a local brokerage firm to do a fair market value (FMV) analysis, Eastside demanded and received a 20% buyer's premium above FMV ostensibly based on its dominant position in the local marketplace.

ECH and Eastside also established a professional services agreement under which Eastside provided exclusive oncology services to ECH. In exchange, Eastside transferred all patients and referrals to ECH and ended its relationship with Minnehaha Health. As a result, ECH agreed to compensate Eastside physicians at twice the market rate for Minneapolis oncologists and an additional referral bonus of $100 million payable over five years.

The ECH-Eastside arrangement also included management fees totaling $30 million per year of which 50% were payments for Eastside physicians performing unspecified inpatient management services at ECH hospitals. Finally, ECH agreed to pay Eastside 30% share of any 340B drug profits.

Individually, Drs. Fontain and Riviera received matching Porsche 911 Carrera Cabriolets as a closing gift from ECH. Dr. Fontain also received a guarantee from ECH to book all hospital lunch and dinner events at Le Jardin in exchange for his efforts to convince Riviera to support the deal.

A Match Made in Heaven

Despite the hefty price tag, ECH believed that this was a lucrative arrangement for the Health System:

March 26, 2021

To: ECH Board of Directors

From: Ken Bradshaw and Jeff Fresia

Subject: CONFIDENTIAL - Acquisition of Minneapolis Eastside Oncology, PLLP

We know that some of you are concerned about the proposed costs of acquiring Eastside. However, we believe that the acquisition is in the best interests of ECH for the following reasons:

1. The exclusive arrangement between ECH and Eastsides removes a potential competitor and provides ECH with a financial windfall of at least $150 million.
2. We anticipate that outpatient oncology claims are likely to double in the first year and continue growing steadily in future years. The primary driver of these increases are projected to come from chemotherapy infusions.
3. We also project significant growth (> 30%) in profits from our 340B discount program when augmented by referrals from Eastside physicians.

The deal turned out to be a bigger "windfall" than ECH originally anticipated. Within a year of the acquisition of Eastside, ECH controlled 80% of the cancer patient market in the Minneapolis-St. Paul area (a 10% increase). Furthermore, outpatient oncology claims increased by 285% and 340B drug profits increased by 50%. As a result of the financial bump received from Eastside, ECH achieved a 28% revenue increase for the overall healthcare system.

The Slighted Partner

Despite ECH's and Eastside's record earnings, there was an undercurrent of unrest bubbling below the surface. The undercurrent began in October 2022, when Dr. Riviera learned from his contacts within ECH that Bradshaw planned on adding Dr. Fontain, but not him, to ECH's Board of Directors. His suspicions raised, Riviera began to dig deeper and finally uncovered a side agreement between ECH and Fontain to exclusively use Le Jardin for hospital events. Based on this information, Riviera confronted Bradshaw:

October 11, 2022

To: Ken Bradshaw

From: Hector Riviera

Subject: Special Treatment for Armand Fontain

As the co-founder of Eastside, I want to know why you are considering elevating Fontain to ECH's Board of Directors and not me? I have done as much as anyone to make our arrangement successful. This is both rude and demeaning. Adding insult to injury, I'm aware of your secret agreement with Fontain involving Le Jardin. What do have to say for yourself? I demand a meeting as soon as possible to discuss these disturbing developments.

Bradshaw responded to Riviera:

October 12, 2022

To: Hector Riviera

> From: Ken Bradshaw
>
> Subject: Re: Special Treatment for Armand Fontain
>
> Hector, while I understand that you are upset, I will not be dictated to by you or anyone else. My decision to ask Dr. Fontain to join the Board and our agreement involving Le Jardin are frankly none of your business. However, if you must know, your contributions pale in comparison to his. At the outset, you were an obstacle to our deal, and in my opinion, you have done little to change things. Therefore, I see no need for a meeting to discuss these developments, which are disturbing only to you.

Upon receiving Bradshaw's response, Riviera proceeded to file a False Claims Act (FCA) *qui tam* action under seal in the U.S. District Court for Minnesota. Unbeknownst to Fontain or Bradshaw, Riviera was already a material witness in two other oncology practice cases under active investigations by the U.S. Attorney's Offices in Minneapolis and Boston. Thus, Dr. Riviera was well known to the government.

In December 2022, Riviera and his lawyer met with the U.S. Attorney's Office to discuss his latest case. Present at that meeting were Assistant U.S. Attorney (AUSA) Heidi Kramer and two members of her staff. The meeting lasted more than two hours during which Riviera detailed the problems with the ECH-Eastside arrangement.

Riveria told the government that Eastside physicians were being compensated at more than 200% compared to private oncologists in the area and more than 400% above the standard Medicare reimbursement rate. He also told the government that ECH covered all expenses and overhead costs, including support staff and office space, at the outpatient clinics. In addition, Riviera also related that Fresia told him after the deal was concluded that ECH always intended to pay Eastside physicians more because of the value of 340B drug profits and referrals for chemotherapy infusion and oral cancer drugs.

Furthermore, Riviera told the government that Eastside physicians received management fees for inpatient services that were not performed. As proof of his allegation, Riviera noted that ECH made the payments to the physicians and did not require any record of their management activities. In addition, using valuation consultants as a smokescreen, ECH increased the fees based upon inpatient and outpatient revenues generated by Eastside referrals. When asked by AUSA Kramer if he ever reported these issues to ECH's Compliance Department, Riviera said, "No, because everyone knows making a report to compliance is the fastest way out the door."

The Ask

Legal Memorandum

As a member of AUSA Kramer's team, she has asked you to prepare a memorandum for her (1) highlighting and discussing the various potential legal issues raised by Riviera's *qui tam* suit against ECH and Eastside, as well as other evidence uncovered in the case and (2) recommending whether the government should intervene in the case.

Slide Deck

She also requested you create a PowerPoint slide deck to present to the ECH Board of Directors. The slide deck should (1) highlight the government's concerns and (2) outline various changes the government would expect ECH to undertake to remediate those concerns (e.g., what would be in a Corporate Integrity Agreement (CIA) or are included in DOJ's 2020 guidance entitled Evaluation of Corporate Compliance Programs).