Developing Compliant Physician Compensation Arrangements in the Current Enforcement Environment

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Lessons Learned from Recent Enforcement Actions

Physician Remuneration Cases

Case / Entity	Alleged Improper Remuneration	Settlement
Union General Hospital (Blairsville, GA) (2019)	Compensation arrangements violated Stark	$5 million
Adventist Health (Altamonte Springs, FL) (2015)	Paid above-market comp and absorbed persistent losses in order to capture referrals; CFO generated spreadsheets comparing losses vs contribution margin	$118.7 million
Broward Health (Fort Lauderdale, FL) (2015)	Tracked profits from employed physicians in "Contribution Margin Reports" and pressured physicians to generate referrals to cover comp	$69.5 million
Citizens Medical Center (Victoria, TX) (2015)	Even though cardiologists made less than national median, hospital doubled their income upon employment	$21.75 million
Halifax (Daytona Beach, FL) (2014)	Productivity bonuses tied to overall profitability of oncology unit	$85 million
Tuomey Health System (Sumter, SC) (2014)	Part-time employment contracts with comp based on referrals	$237 million + $1 mil CEO

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

- Memorial University Medical Center (Savannah)
- Board retreat
  - Financial problems due to declining admissions
  - Strategic priorities: "Market Growth" and expand employment of primary care physicians
  - Continue pursuit Eisenhower Medical Associates (who were employed at competitor hospital)

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

- Presentation to board to approve acquisition:
  - "High volume practice with large numbers of hospital admissions and referrals to specialists."
  - "Estimated gross revenues (including downstream revenues from referrals)" to Hospital of:
    - Year 1: $57 million + $3.4 million radiology
    - Year 2: $63 million + $3.7 million radiology
  - Projected contribution margin of $3.5-$5.0M per year.
  - These figures "account for almost 6%" of total volume at competitor hospital

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

- Different version of slide deck deleted "referral," "downstream revenue," and "projected contribution margin"
- Memorial projected acquisition would result in financial losses of $670,000 per year for five years
- Management recommended approval of deal because of increase in "hospital revenue"

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

	2008	2009	2010	2011
Bradley	$229,853.35	$612,782.98	$646,974.68	$137,628.04
Corse	$208,451.71	$501,388.75	$683,874.51	$133,661.78
Gaskin	$151,513.27	$418,109.81	$324,628.34	$ 87,081.76
Losses	$597,000.00	$1,100,000.00	$1,400,000.00	$392,000.00

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

- 2009: Phillip Schaengold hired as CEO
- Directed staff to approach doctors about reducing compensation due to compliance concerns
- Email from Sr VP of Physician Services to several physicians:
  - "You have a unique compensation formula that no other Memorial physician has – the model is different."
  - "Your compensation is well above the 90th percentile. . . . Your compensation must be proportional to your wRVU productivity and your current compensation is not."

U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.)

- Dr. Gaskin's handwritten notes from meeting with Sr VP of Physician Services:
  - Memorial's "goal is to not appear that they are buying referrals."
- Did the doctors agree to modify arrangements?
- Board member email: "We all recognize we cannot continue to pay the salaries at the same level. However, we cannot afford to lose paying patient referrals to the hospital."
- Case settled for $9.9 million

U.S. ex rel. Barker v. Columbus Regional Healthcare System Inc.

- Columbus Regional Healthcare (Columbus, GA)
- Employed Dr. Andrew Pippas – medical oncologist
  - wRVU production compensation model
    - Compensation was more than 2x his collections
    - Dr. Pippas allegedly claimed he was undercompensated in light of his referrals to the hospital
  - FMV found that Dr. Pippas was being paid above 90th percentile but this was reasonable based upon his consistent historical level of production

U.S. ex rel. Barker v. Columbus Regional Healthcare System Inc.

- Follow Up FMV report: Questioned reasonableness of compensation where Dr. Pippas was being paid "above all established benchmarks"
  - Lowered wRVU conversion factor moving forward
- Third FMV report: Compensation exceeds FMV after additional review showed Dr. Pippas's compensation included credit for productivity of another physician
  - Continued to receive credit for six years after problem was noted

U.S. ex rel. Barker v. Columbus Regional Healthcare System Inc.

- Chief Compliance Officer File Notes
  - "The base compensation is an issue for me because I believe the 'impossible day' as well as 'reasonableness test' needs to be considered.... "It is very difficult to support the idea that here in Columbus Ga. We have the top producer in the entire United States..."
  - "[N]ow we have the top or second top wRVU producer in the country AND he is doing so in less than 5 days a week."
  - "The independent third party had opined that they do not have any other client that is currently paying a physician in this specialty at the rate Dr. Pippas is being paid."

U.S. ex rel. Barker v. Columbus Regional Healthcare System Inc.

- Dr. Pippas also had two medical directorships that paid him a stipend of $300,000 per year
  - Time records showed him working fewer than 5 days a week but medical director time logs showed 60-80 hour per month
  - Nearly half of employed oncologists served as medical directors
  - "This is significantly more than any other Medical Director and when combined with current salary calculations makes the issues forma total comp seem much worse."

U.S. ex rel. Barker v. Columbus Regional Healthcare System Inc.

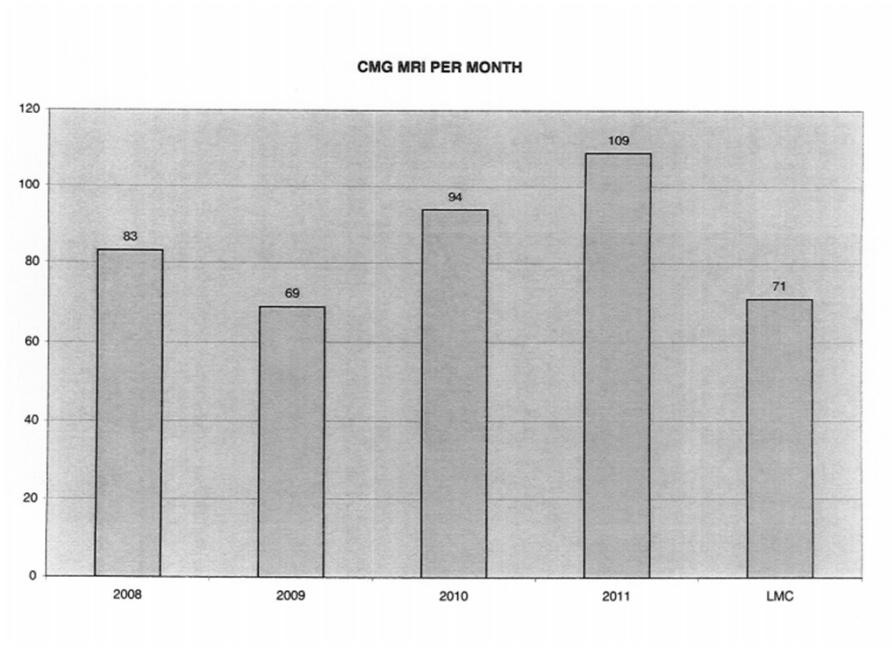
- Up to $35 million settlement by hospital
  - Plus $425,000 paid by Dr. Pippas
- Watch out for "double-dipping," i.e., paying physicians for services for which they already are receiving payment
- Would a reasonable commercial entity enter into the arrangement absent a potential for referrals?
- Services must actually be performed under agreements. Otherwise, it can appear that physicians are being paid for referrals.
  - Time logs to support work being performed
  - Written agreements changed if relationship or arrangement is changed

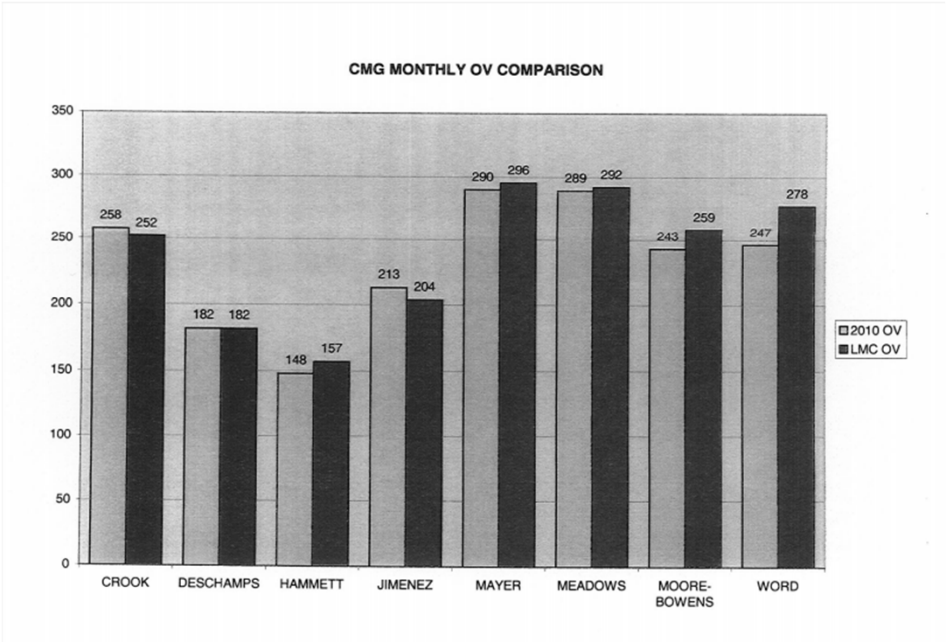
U.S. ex rel. Hammett v. Lexington Medical Center

- Columbia Medical Group (CMG) – 7 IM; 1 neuro
- Lexington Medical Center (LMC) acquired CMG
  - Seven-year no-cut employment contracts
- Compensation
  - Three-tiered RVU range where RVU multiplier increased at each tier
  - Relator's compensation increased from $250,000 to $650,000
  - One IM received salary above $500,000
- Practice manager: LMC's competitor "had their chance" to buy CMG but they "were not event close" to what LMC was offering to purchase the practice

U.S. ex rel. Hammett v. Lexington Medical Center

- LMC subjected CMG physicians to "greater financial scrutiny" than CMG had done
  - RVU reports sent to physicians monthly; compared physicians' productivity against one another
  - Bar graph reports comparing pre- and post-acquisition ancillary referrals
  - Encouraged to order more imaging studies


CMG MRI PER MONTH
120
100
80
60
40
20
0
83
69
94
109
71
2008
2009
2010
2011
LMC


CMG MONTHLY OV COMPARISON
350
300
250
200
150
100
50
0
258
252
182
182
148
157
213
204
290
296
289
292
243
259
247
278
CROOK
DESCHAMPS
HAMMETT
JIMENEZ
MAYER
MEADOWS
MOORE-BOWENS
WORD
2010 OV
LMC OV

U.S. ex rel. Hammett v. Lexington Medical Center

- Relator continued to send some MRIs outside LMC system (for price reasons)
  - LMC staff met with Relator to ask why
  - LMC told him sending studies outside LMC threatened "the jobs of practice staff"
- Relator alleges he was terminated after refusing to resign

U.S. ex rel. Hammett v. Lexington Medical Center

- Potentially aggressive compensation structure and contract

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- Bad statements by practice manager

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- Tracking referrals by physician

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- Perceived pressure to refer

=

- $17 million settlement

William Beaumont Hospitals (E.D. Mich.)

- Detroit health system agreed to pay $84.5M to settle allegations that it violated AKS and Stark by providing physicians with excessive pay and low-cost or free office space
- Physician contracts were a "mess"
- Medical directorships duplicative of work compensated under other contracts
- Medical directorships with four cardiologists paid each $500,000 or more despite the physicians being in full-time medical practice.
- After group made clear it was considering moving their practice to a competing health system, Beaumont allegedly increased medical director payments to between $671,304 and $734,218 per doctor, even though the duties performed by the directors did not change.
- "Devastating" report from FTI Consulting was ignored

William Beaumont Hospitals (E.D. Mich.)

- Doctors with six-figure medical directorships referred to as the "Royal Family;" said one doctor: "You did not want to tick off the RF."
- "You need to learn to just go along with physicians, help them do what they want, and not create waves or try to be a crusader. If you keep creating waves, you will be destroyed."

Takeaways

- Build out reasoned rationale for acquisition supported by data
- Consider total picture when considering increase in compensation as part of acquisition
- Tiered compensation formulas are risky due to ability to exceed FMV at higher tiers and difficult to administer
- Focus on appropriate use of referral data
  - Quality and service concerns can be appropriate
  - Use of referral data to make compensation or employment decisions is not appropriate

Takeaways

- Compensation based on FMV for services being provided
- Management or administrative services
  - Business justification
  - Actually performed

Understanding Legal Requirements for Physician Compensation Arrangements

Stark Law

The Physician Self-Referral Statute ("Stark Law"), 42 U.S.C. 1395nn, prohibits:

1. Physicians from referring Medicare/Medicaid patients for certain designated health services (DHS) to an entity with which the physician or a member of the physician's immediate family has a financial relationship—
2. It also prohibits an entity from presenting or causing to be presented a bill or claim to anyone for a DHS furnished as a result of a prohibited referral.

Unless an exception applies.

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Bona Fide Employment (42 C.F.R. §411.357(c))

- Employment for identifiable services
- Remuneration is:
  - Consistent with fair market value
  - Not determined in a manner that takes into account (directly or indirectly) volume or value of referrals, except for productivity bonus based on services performed personally by the physician
  - Commercially reasonable even without referrals

Personal Service Arrangements (42 C.F.R. §411.357(d))

- Signed writing specifying all services furnished by physician
  - Incorporate other agreements by reference or cross-reference master contract list maintained and updated centrally
- 1-year term
- Compensation:
  - Set in advance
  - Does not exceed fair market value
  - Except for "physician incentive plan," is not determined in a manner that takes into account the volume or value of referrals
- Reasonable and necessary services for legitimate business purposes of the arrangement
- Services do not involve counseling or promotion of business arrangement or other activity that violates any Federal or State law

Anti-Kickback Statute

- Criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce referrals of items or services reimbursable by a federal health care program
  - No actual knowledge or specific intent required
- "Remuneration" includes the transfer of anything of value, in cash or in kind, directly or indirectly, covertly or overtly

Employment Safe Harbor (42 U.S.C. §1320a-7b(b)(3)(B); 42 C.F.R. §1001.952(i))

- Paid by employer to employee
- Employee has *bona fide* employment relationship with employer
- Employment is for furnishing of any item or service reimbursable under Medicare, Medicaid, or other Federal health care programs

Personal Services Safe Harbor (42 C.F.R. §1001.952(d))

- Signed writing covering specifying services that are reasonable and necessary to accomplish business purpose
  - If less than full-time, specifies exact schedule and charge
- 1-year term
- Compensation:
  - Is set in advance
  - Is consistent with fair market value
  - Does not take into account any business generated between parties for which payment may be made by Federal health care program
- Services do not involve counseling or promotion of activity that violates law

Special Considerations For FMV and Commercial Reasonableness

Focus on Fair Market Value

- Stark Statute: Value in arm's length transactions, consistent with general market value... (1877 (h)(3) of the Social Security Act)
- Narrower regulatory definition (42 CFR §411.351)
  - Value in arm's-length transactions, consistent with general market value
  - General market value means compensation as result of bona fide bargaining between well informed parties not otherwise in position to generate business for other party
  - Compensation does not take into account volume or value of anticipated or actual DHS referrals

Focus on Fair Market Value

- AKS safe harbor regulations require FMV, but AKS does not define it.
- Special Fraud Alert – Clinical Laboratory Services (October 1994)
  - Presumption: Compensation outside of FMV is in exchange for referrals
- OIG Compliance Guidance for Individual and Small Group Practices (October 2000)
  - "The OIG's definition of 'fair market value' excludes any value attributable to referrals of Federal program business or the ability to influence the flow of business."

Focus on Fair Market Value

- OIG Supplemental Guidance for Hospitals (January 2005)
  - Need appropriate processes for making and documenting reasonable, consistent, and objective determinations of FMV
  - Is the determination of FMV based upon a reasonable methodology that is uniformly applied and documented?
  - If FMV based on comparables, ensure market rate for comparable services is not distorted.

Focus on Commercial Reasonableness

- Stark Commentary:
  - Subjective Concept (Phase I): Sensible, prudent business agreement from the perspective of the parties
  - Objective Concept (Phase II): Would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential for DHS referrals

Best Practices for Establishing and Auditing Physician Employment Arrangements

Arrangement Review Process

- Use contract management tool to manage agreements.
- Establish centralized contracting process for consistent review and approval of all arrangements.
- Develop template agreements meeting legal requirements.
- Confirm fair market value of arrangement.
  - Consider when outside valuations will be required.
  - DON'T forum shop opinions
  - Choose experienced, reputable valuator.
- Document appropriate business justification for arrangement.
    - DON'T pay for referrals.

Compensation Structure Development

- Simple – easily administered and physicians understand it
- Consistent – minimal variation driven only by sound and appropriate principles
- Auditable – can be regularly reviewed
- Compliant – Link to production, collections, need or other compliant measure to support amount

Arrangement Tracking

- Require periodic reevaluation of FMV and commercial reasonableness
- Update arrangements if change in relationship
  - Compensation changes must follow centralized process.
- Enforce detailed payment tracking
  - NO payment without documentation.
  - If the arrangement involves services, track service and activity logs.
  - If the arrangement involves space or equipment, monitor use of leased space or equipment.

Arrangement Audit Process

- Step One – Establish audit parameters.
  - Who performs the audit?
  - Will the audit be performed under privilege?
  - What is the purpose and scope of the audit?

Arrangement Audit Process

- Step Two – Gather documents for review.
  - Master contract list
  - Copies of agreements
  - Fair market value support for compensation
  - Inventory of equipment and space in use by physicians
  - Time records and logs
  - General ledger accounts, accounts payable distribution, and vendor master file
  - Accounts payable and payroll information for payments to physicians
  - Accounts receivable for payments from physicians
  - Minutes or other similar documents to memorialize rebuttable presumption procedures followed

Arrangement Audit Process

- Step Three – Review and analyze documents.
  - Is there a written agreement for all payments to/from physicians?
  - Has the agreement expired?
  - Are payments being made in compliance with the agreement?
  - Has the relationship changed since the agreement's execution?
  - Is the agreement at FMV and commercially reasonable?
  - Are the parties complying with the agreement terms?
  - Does the agreement comply with the requirements of the applicable Stark exception/AKS safe harbor?

Arrangement Audit Process

- Step Four – Interview personnel and gather additional documentation to verify information and fill in any gaps.
  - Performance of duties
  - Continued business need
  - Change in relationship or arrangement
  - Review of facility to identify undocumented space or equipment rentals

Arrangement Audit Process

- Step Five – Take corrective action as needed to ensure continued compliance.
  - Termination or amendment of agreements
  - Implementation of new agreements
  - Consideration of potential refund or disclosure obligations

Questions