

Fraud Alert Puts Added Pressure on Physicians

On June 9, 2015, the *Office of Inspector General (OIG)* of the *U.S. Department of Health and Human Services (HHS)* released a fraud alert entitled, “*Physician Compensation Arrangements May Result in Significant Liability.*” This alert warns physicians of potential *individual liability* (in addition to healthcare entity liability) if their medical directorship agreements do not reflect *fair market value (FMV)* remuneration for bona fide services provided.¹ The alert emphasized the penalties from the federal *Anti-Kickback Statute* or *Civil Monetary Penalties* law under which physicians may be liable if they do not perform the actual duties listed in their medical directorship agreements.²

The motivation for the OIG’s issuance of the guidance seems to stem from its settlements throughout 2013 and 2014 with 12 physicians who entered into questionable medical directorships and office staff payment arrangements with Fairmont Diagnostic Center and Open MRI, Inc., in Pasadena, Texas, for individual sums ranging from \$50,000 to \$195,016.³ The specialties of the 12 physicians involved include: family practice (four physicians), orthopedic surgery (two physicians); urology (two physicians); orthopedics; primary care and internal care; gastroenterology; and, occupational health.⁴ In the fraud alert, the OIG alleged that:

- (1) The payments with the 12 physicians took into account the volume or value of referrals;
- (2) The payments did not reflect fair market value for services to be performed;
- (3) The physicians did not provide the services called for under the agreements; and,
- (4) Some of the 12 physicians entered into arrangements wherein an affiliated healthcare entity paid the salaries of the physicians’ front office staff, which relieved the physicians of a financial burden they would have otherwise incurred.⁵

Beyond the medical directorships, the OIG asserted that the relief of the physicians’ financial burden for rendering payment to front office staff was an improper remuneration to the physicians.⁶ Emphasizing the OIG’s pressure to hold physicians accountable for their role in fraudulent arrangements, the lawsuit alleged that the physicians were integral to the remuneration scheme,

and, therefore, were subject to liability under the *Civil Monetary Penalties* law.⁷ The radiologist who founded and owned Fairmont Diagnostic Center and Open MRI, Inc., at the time of the alleged fraud also settled for \$650,000 with the OIG in 2012 for his and the company’s role in allegedly arranging and entering into the medical directorships with the physicians.⁸

Although these settlements may represent the OIG’s most significant pursuit of physicians in recent history, it is not the first time the OIG has pursued individual physicians for their role in healthcare fraud schemes. Following an investigation by the OIG, in 2014, the U.S. Department of Justice (DOJ) settled alleged fraud and abuse violations for \$380,000 with two cardiologists who allegedly entered into sham management agreements that were not *commercially reasonable* in exchange for their referral of patients seeking cardiology and other healthcare services.⁹ The hospital that executed the agreements with the physicians settled with the *U.S. Department of Justice (DOJ)* for \$15.6 million for its part in the alleged sham management agreements and for allegedly billing unnecessary and excessive cardiology procedures that were performed by those and other physicians.¹⁰

Former government attorneys and other healthcare industry experts and analysts believe that the recent fraud alert regarding physician liability is an effort by the OIG to remind physicians of their expected role of actively participating in contract negotiations with healthcare organizations.¹¹ A former chief counsel at the OIG has asserted that this is a signal of future increased scrutiny of compensation arrangements, and suggests that physicians and organizations pay closer attention to the contracts they arrange.¹² A former special assistant U.S. attorney contends that the fraud alert is a reminder that the OIG is monitoring the arrangements between physicians and the organizations that pay them, and he also notes that the alert serves as a warning to physicians that these fraud cases may be handled either civilly, or even criminally if intent can be proved, increasing the pressure on physicians to inspect their own contracts to ensure they are receiving reasonable compensation for services provided.¹³ The *American Health Lawyers Association (AHLA)* also noted that the OIG “*seems to be focused on making sure that physicians appreciate that they—and not just the*

institutions that contract with them—could be held liable for entering into questionable arrangements.”¹⁴

As a result of the recently heightened scrutiny of payment arrangements of physicians and healthcare organizations, the OIG is hiring additional lawyers to investigate physician involvement, according to Kevin Barry, a Deputy Chief in the Administrative and Civil Remedies Branch of OIG who spoke at the *American Bar Association Health Law Section’s Physician Legal Issues Conference* in June 2015.¹⁵ To decrease the risk of investigation by the OIG, one healthcare attorney who was quoted in an *AIS Health* article suggested that physicians should obtain their own fair market value assessment when negotiating contracts with hospitals.¹⁶ She further recommended that even if a healthcare organization does not closely monitor the timesheets of its physicians, each physician would be well served to accurately maintain his or her own timesheets and ensure actual performance of his or her contractual duties to avoid a subsequent potential investigation by the federal government.¹⁷

1 “Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability” OIG, June 9, 2015, https://oig.hhs.gov/compliance/alerts/guidance/Fraud_Alert_Physician_Compensation_06092015.pdf.
2 Ibid.
3 “Kickback and Physician Self-Referral” OIG, <https://oig.hhs.gov/fraud/enforcement/cmp/kickback.asp> (Accessed 6/15/15).
4 Ibid.
5 OIG, “Fraud Alert,” June 9, 2015.
6 Ibid.
7 Ibid.

8 “Settlement Agreement” 8/14/2012, <http://policymed.typepad.com/files/fairmont-false-claims-act.pdf> (Accessed 6/15/15) p. 1, 4, (The company was sold on June 16, 2011 to Michael McCombs, and the name was subsequently changed to Fairmont Diagnostic and MRI Center, LLC. The lawsuit was against the original owner, Jack Baker and his company Fairmont Diagnostic Center and Open MRI, Inc.).
9 “Kentucky Cardiologists Agree to Pay \$380,000 to Settle False Claims Act Allegations Based on Illegal Referrals” DOJ, October 21, 2014, <http://www.justice.gov/opa/pr/kentucky-cardiologists-agree-pay-380000-settle-false-claims-act-allegations-based-illegal> (Accessed 6/15/15).
10 Ibid.
11 “OIG Fraud Alert Highlights Risks in Physician Compensation Arrangements” By James Swann, Bloomberg BNA: Health Care Fraud Report, June 10, 2015, <http://www.bna.com/oig-fraud-alert-n17179927532/> (Accessed 6/15/15); “New OIG Fraud Alert Puts Doctors on Notice” By Lisa Schencker, Modern Healthcare, June 9, 2015, <http://www.modernhealthcare.com/article/20150609/NEWS/150609885> (Accessed 6/15/15).
12 James Swann, June 10, 2015.
13 Lisa Schencker, June 9, 2015.
14 “Latest OIG Fraud Alert Targets Physician Compensation Arrangements” By Adam Rogers, American Health Lawyers Association, June 12, 2015.
15 “OIG to More Closely Scrutinize Doctors’ Compensation” By Lisa Schencker, Modern Healthcare, June 12, 2015, <http://www.modernhealthcare.com/article/20150612/NEWS/1506129964/oig-to-more-closely-scrutinize-doctors-compensation> (Accessed 6/16/15).
16 “Fraud Alert Signals More MDs Will Face Penalties for Noncompliant Hospital Deals” By Nina Youngstrom, Health Business Daily, *AIS Health*, June 15, 2015, http://aishealth.com/archive/rmc061515-01?utm_source=Real%20Magnet&utm_medium=Email&utm_campaign=77193307 (Accessed 6/7/15).
17 Ibid.



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Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institute of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: *“Accountable Care Organizations: Value Metrics and Capital Formation”* [2013 - Taylor & Francis, a division of CRC Press], *“The Adviser’s Guide to Healthcare” – Vols. I, II & III* [2010 – AICPA], and *“The U.S. Healthcare Certificate of Need Sourcebook”* [2005 - Beard Books]. His most recent book, entitled *“Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services”* was published by John Wiley & Sons in 2014.

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious *“Shannon Pratt Award in Business Valuation”* conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the author of the soon-to-be released *“Adviser’s Guide to Healthcare – 2nd Edition”* (AICPA, 2014), numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies; Business Appraisal Practice*; and, *NACVA QuickRead*. Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); the Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, and economic and financial analysis.



Jessica L. Bailey, Esq., is the Director of Research of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the Journal of Health Law and Policy.



Richard W. Hill, III, Esq. is Senior Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he manages research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and conducts analyses of contractual relationships for subject enterprises. Mr. Hill is a member of the Missouri Bar and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law.