

## Telemedicine CEO Pleads Guilty to \$424 Million Fraud Conspiracy

On September 6, 2019, the *U.S. Department of Justice* (DOJ) announced that the owner and chief executive officer (CEO) of a telemedicine company pleaded guilty for his role in one of the largest healthcare fraud schemes ever investigated by the *Federal Bureau of Investigation* (FBI) and the *U.S. Department of Health and Human Services Office of the Inspector General* (HHS-OIG), and prosecuted by the DOJ, stemming from April 2019 charges against 24 defendants.<sup>1</sup> Lester Stockett (Stockett), owner of Video Doctor USA (Video Doctor), and owner and CEO of Telemed Health Group LLC (AffordADoc), pleaded guilty to one count of conspiracy to defraud the U.S. and pay and receive healthcare kickbacks, and one count of conspiracy to commit money laundering.<sup>2</sup> Stockett agreed to pay \$200 million in restitution, as well as forfeit assets and property traceable to conspiracy to defraud the U.S.<sup>3</sup> Assistant Attorney General Brian A. Benczkowski of the Justice Department's Criminal Division described the conspiracy, which occurred from March 2016 until April 2019, as "*exploiting telemedicine technology meant to help elderly and disabled patients in need of health care.*"<sup>4</sup> In connection with his guilty plea, Stockett admitted that he and others agreed to solicit and receive illegal kickbacks and bribes from patient recruiters, pharmacies, brace suppliers, and others in exchange for arranging physicians to order medically unnecessary orthotic braces for beneficiaries of Medicare and other insurance carriers.<sup>5</sup> Stockett admitted to paying illegal kickbacks and bribes to healthcare providers to order the medically unnecessary braces.<sup>6</sup>

This is not the first time that telemedicine companies have been found in violation of federal fraud and abuse laws. In July 2019, the DOJ announced an indictment of an anesthesiologist for her role in a \$7 million conspiracy to commit healthcare fraud in a telemedicine scheme to submit fraudulent claims to federal healthcare programs and private health insurance plans.<sup>7</sup> Additionally, in August 2019, the DOJ announced that a telemarketer and his companies agreed to pay \$2.5 million to settle Anti-Kickback Statute and False Claims Act allegations that the companies illegally obtained customers' insurance information and arranged for them to receive (medically unnecessary) pain creams and other types of products (without a valid physician-patient relationship) for the sake of selling the prescriptions to pharmacies as part of their "*marketing services.*"<sup>8</sup>

Telemedicine, generally, is the remote delivery of healthcare services and clinical information using telecommunications technology.<sup>9</sup> However, the specific definition of *telemedicine* varies.<sup>10</sup> *Telemedicine* is frequently, but mistakenly, used interchangeably with *telehealth*, which refers broadly to electronic and telecommunications technologies and services used to provide care and services at a distance.<sup>11</sup> Telemedicine refers specifically to remote clinical services, while telehealth can refer to remote non-clinical services.<sup>12</sup> The ideologically diverse views on U.S. healthcare reform results in most telemedicine reforms occurring at the state, rather than federal, level.<sup>13</sup> Despite the current patchwork regulation, telemedicine is expected to remain (and expand) as a mainstay of the U.S. healthcare delivery system. This is evidenced in part by the preamble to the 2011 final *accountable care organization* (ACO) rule, which encourages ACOs to employ telemedicine as one of their key tools.<sup>14</sup> Further, the *Centers for Medicare and Medicaid Services* (CMS) finalized rule language in April 2019 to bring telehealth benefits to Medicare Advantage plans, Medicare private health insurance plans, which will expand access for patients, and improve coordination for dual-eligible, beneficiaries covered under Medicare and Medicaid.<sup>15</sup>

The *Anti-Kickback Statute* (AKS) "*provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration [directly or indirectly] to induce or reward the referral of business reimbursable under Federal health care programs.*"<sup>16</sup> [Emphasis added.] AKS violations are punishable by up to five years in prison, criminal fines up to \$25,000, or both.<sup>17</sup> Of note, healthcare providers violate the AKS if even *one purpose* of the arrangement in question is to offer remuneration deemed illegal under the AKS.<sup>18</sup> In order to prove a violation of the AKS, the government must show that the defendant was aware that the conduct in question was "*generally unlawful,*" but not that the conduct specifically violated the AKS.<sup>19</sup>

Remuneration, for purposes of the AKS, can be anything of value (inclusive of more than money) that is knowingly and willfully obtained.<sup>20</sup> The wide net that is cast by the AKS can put many proposed and current actions of telemedicine companies in precarious situations. Courts are split as to whether the AKS qualifies as a highly technical area of law which would make the *willful* and *knowledge* standard of AKS a higher

standard of intent to meet, and seem to apply a sliding scale to that standard, based on the circumstances of the case.<sup>21</sup>

Due to the broad nature of the AKS, legitimate business arrangements may appear to be prohibited.<sup>22</sup> In response to these concerns, Congress created a number of statutory exceptions and delegated authority to the HHS to protect certain business arrangements by means of promulgating several *safe harbors*.<sup>23</sup> These *safe harbors* set out regulatory criteria that, if met, shield an arrangement from regulatory liability, and are meant to protect transactional arrangements unlikely to result in fraud or abuse.<sup>24</sup> Failure to meet all of the requirements of a *safe harbor* does not necessarily render an arrangement illegal.<sup>25</sup>

As noted above, telemedicine arrangements may be subject to AKS, including arrangements among telemedicine providers, as well as arrangements with the technology partners with which healthcare organizations interact.<sup>26</sup> OIG advisory opinions (guidance from the federal government on specific healthcare arrangements) have highlighted the various attributes that may render telemedicine arrangements legally permissible, such as ensuring that:

- (1) There is no volume or value difference because of the arrangement;
- (2) The primary beneficiaries of the arrangement would be the patients, not the providers;
- (3) The arrangement increases the timeliness of care, in order to decrease the rate of mortality in rural areas;
- (4) The arrangement has safeguards in place to prevent inappropriate patient steering;
- (5) The arrangement does not inappropriately increase costs to federal healthcare programs;
- (6) The business benefits to the organizations from the arrangement are minimal and incidental; and,
- (7) Patients are given free choice to choose providers after consultation.<sup>27</sup>

There are two AKS safe harbors particularly relevant to telemedicine: (1) when a provider receives free electronic prescribing technology or training; and, (2) when a

provider receives free electronic health records software, information technology, or training.<sup>28</sup> Thus, adherence to one of these safe harbors could, in theory, potentially reduce or eliminate associated kickback risks.<sup>29</sup> As noted above, failure to comply with a safe harbor provision does not mean an arrangement is *per se* illegal.<sup>30</sup> Further, limited reimbursement from Medicare does not necessarily reduce kickback risks; a telemedicine arrangement could violate the AKS by inducing other referrals.<sup>31</sup> In addition to regulatory considerations, the *American Medical Association* (AMA) emphasizes certain ethical considerations, including that:

- (1) All physicians who participate in telemedicine have an ethical responsibility to disclose to the patient any financial or other interests in connection to the application or service;
- (2) All physicians inform patients about the limitations of the service;
- (3) Physicians advise about follow-up care if needed; and,
- (4) Physicians encourage patients to inform their primary care provider about the online consultation.<sup>32</sup>

As mentioned in the September 2018 *Health Capital Topics* article titled, “*CMS Seeks Comments on Anti-Kickback Statute Reform*,” both healthcare industry stakeholders and politicians have a significant interest in prospective reforms to federal fraud and abuse laws (including for the AKS), but no modification of the implementation of the regulations have materialized thus far.<sup>33</sup> Organizations with active involvement in the telemedicine space such as Connected Health Initiative have pushed for certain AKS reforms specific to telemedicine, such as giving patients a device with which they can communicate with a care team to better meet patient needs.<sup>34</sup> Despite the Trump Administration’s actions to deregulate the healthcare industry over the past couple years, the number of new cases enforcing healthcare fraud and abuse laws (especially those as relate to the fast-evolving telemedicine sector) suggest that regulatory enforcement is likely to remain vigilant going forward, and that all parties to a telemedicine arrangement (and not just physicians) are potentially liable.

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3 *Ibid.*

4 *Ibid.*

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6 *Ibid.*

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**Todd A. Zigrang**, MBA, MHA, CVA, 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 co-author of "[The Adviser's Guide to Healthcare – 2nd Edition](#)" [2015 – AICPA], 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*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); American Health Lawyers Associate (AHLA); the American Bar Association (ABA); the National Association of Certified Valuators and Analysts (NACVA); 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's areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo. 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. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



**Jessica L. Bailey-Wheaton**, Esq., is Vice President and General Counsel 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-Wheaton 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 & Policy*.



**Daniel J. Chen**, MSF, CVA, is a Senior Financial Analyst at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he develops fair market value and commercial reasonableness opinions related to healthcare enterprises, assets, and services. In addition, Mr. Chen prepares, reviews and analyzes forecasted and pro forma financial statements to determine the most probable future net economic benefit related to healthcare enterprises, assets, and services, and applies utilization demand and reimbursement trends to project professional medical revenue streams, as well as ancillary services and technical component (ASTC) revenue streams. Mr. Chen has a Master of Science in Finance from Washington University St. Louis.