

# Physician Organizations

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—from a declaration of the American Bar Association

## “It Takes Two to Tango”<sup>1</sup>— Increased Government Enforcement Against Individual Physicians

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### The Trusted Gatekeepers

Physicians play a central role in the ordering and delivery of healthcare services. As “gatekeepers to the healthcare system,”<sup>2</sup> the government has historically placed an “enormous amount of trust in the physician’s judgment.”<sup>3</sup> Based on this trust, individual physicians historically were not subject to the same level of governmental scrutiny as were hospitals and other healthcare facilities. In addition to appearing less sympathetic to a potential jury, hospitals and healthcare facilities were also more appealing enforcement targets because of their more significant financial resources. As a consequence, some in the physician community often viewed compliance with federal healthcare laws and regulations as more of a concern for the healthcare facility, and not the physician.

Although in past years hospitals and healthcare facilities have been the government’s primary target, several recent settlements involving individual physicians demonstrate that the government could be expanding its enforcement net to include the other side of those financial relationships—physicians accused of soliciting and/or accepting illegal remuneration in exchange for referrals. As a result, physicians and their counsel should take note of the risks of government enforcement actions in response to any involvement in transactions with healthcare facilities and providers that may violate



federal healthcare laws. As recently noted by U.S. Department of Health and Human Services Office of Inspector General (HHS OIG) Chief Counsel Lewis Morris, “When we’re doing our analysis of the [healthcare] fraud problem, we have come to recognize we’re only going to get our arms around this if we address both parties to the scheme.”<sup>4</sup>

## Recent Enforcement Actions Involving Individual Physicians

In December 2007, HealthSouth Corporation agreed to pay \$14.2 million to settle allegations by the U.S. Department of Justice (DOJ) that HealthSouth had paid illegal kickbacks to physicians who referred patients for care in some of its hospitals, outpatient rehabilitation clinics, and ambulatory surgery centers.<sup>5</sup>

The government then turned its attention to the individual physicians involved in these arrangements. On December 1, 2009, DOJ announced that Kerlan-Jobe Orthopedic Clinic (Kerlan-Jobe), a sports medicine clinic located in Los Angeles, CA, agreed to pay the United States \$3 million to settle allegations that it received illegal kickbacks from HealthSouth Corporation.<sup>6</sup>

The settlement originally stemmed from HealthSouth’s self-disclosure in 2004 and 2005 of certain financial relationships with physicians, including Kerlan-Jobe, to the U.S. Attorney for the Northern District of Alabama and the OIG. The investigation leading to the Kerlan-Jobe settlement was a collaborative effort of the DOJ Civil Division, the U.S. Attorney’s Office for the Central District of California, and the OIG. Kerlan-Jobe settled with the DOJ to resolve allegations that HealthSouth paid kickbacks to Kerlan-Jobe in the form of stock option grants, donations to the Kerlan-Jobe Foundation, loan forgiveness on an equipment lease, and what was described by DOJ as “disproportionately high ownership interest in a jointly owned ambulatory surgery center.”

In another recent example of government enforcement against individual physicians, the U.S. Attorney’s Office for New Jersey announced on September 16, 2009, that the government reached settlements totaling approximately \$960,000 with three cardiologists who had allegedly received kickbacks through sham employment contracts with the University of Medicine and Dentistry of New Jersey (UMDNJ).<sup>7</sup> The government alleged that beginning in 1995, UMDNJ began to enter into part-time employment agreements with local cardiologists to perform bona fide services. The government further alleged that it was understood that the services to be provided by the cardiologists

were never to be performed, and thus served as illegal kickbacks intended to boost referrals to UMDNJ. In announcing the settlement agreement, Acting U.S. Attorney Ralph Marra stated that the government “will continue to pursue those physicians who abuse and defraud federal healthcare programs by making referrals based on financial considerations rather than the best interests of patients.”<sup>8</sup>

The settlement agreements with the cardiologists are part of a larger investigation against UMDNJ, pursuant to which UMDNJ agreed to pay the government approximately \$8.3 million to settle allegations that it paid illegal kickbacks to cardiologists and submitted false claims to the government.<sup>9</sup> The government has also reached settlements with six other cardiologists, including two cardiologists who have pleaded guilty to criminal embezzlement charges, in connection with the employment contract scheme. The government further stated that it will continue its investigation of other physicians that may be involved in the contract scheme.<sup>10</sup>

On March 9, 2010, the DOJ announced that Rush University Medical Center (Rush) in Chicago, IL, entered into a settlement agreement with the government, and agreed to pay \$1.5 million to resolve allegations that Rush submitted false claims.<sup>11</sup> The allegations against Rush included entering into certain leasing arrangements for office space with two individual physicians and three physician practice groups, including Midwest Orthopedics at Rush LLC (Midwest), that violated the Stark Law.<sup>12</sup> Midwest was named as a defendant pursuant to the whistleblower complaint filed by Dr. Robert Goldberg and June Beecham.<sup>13</sup> Although the government declined to intervene as to claims against Midwest, they reserved the right to intervene at a later date for good cause.<sup>14</sup> As a consequence, the government may choose to intervene in the future to focus on the individual physicians involved in these financial relationships.

It is not only individual physicians who are being targeted. As a further sign that the government may be expanding its enforcement efforts beyond healthcare facilities, Michael Bakst, PhD, former chief executive officer of Community Memorial Hospital of Ventura, CA, recently entered into a \$64,000 settlement with the government to resolve allegations that he violated the federal physician self-referral law.<sup>15</sup> The government alleged Bakst personally negotiated financial arrangements with physicians and directed improper payments to them in violation of the Stark law.<sup>16</sup> In the OIG’s October 5, 2009, press release, Morris stated, “The Office of Inspector General strongly believes that, in addition to holding corporations accountable for healthcare fraud, individuals who caused the fraud should also be held accountable.”<sup>17</sup>





## Government's Increased Emphasis on Targeting Healthcare Fraud

Throughout the recent healthcare reform debate, it has frequently been emphasized that the U.S. government loses more than \$60 billion each year to healthcare fraud.<sup>18</sup> However, in recent congressional testimony, Morris stated that for every dollar spent on OIG oversight from fiscal years (FYs) 2006-2008, there was a return of \$17 to the federal healthcare programs.<sup>19</sup> As a consequence, it is not surprising that combating healthcare fraud is one of the few areas that has captured strong bipartisan consensus. Due to the fiscal demands resulting from expanded health coverage, healthcare fraud enforcement is viewed as an attractive potential revenue stream. As a result, the Obama Administration has increased its emphasis on healthcare fraud, including a surge in funding for healthcare fraud enforcement and ratcheting up anti-fraud rhetoric.<sup>20</sup>

In a public demonstration of their commitment to the enforcement of healthcare fraud, HHS and DOJ held a National Summit on Healthcare Fraud on January 28, 2010. In his remarks at the conference, U.S. Attorney General Eric Holder stated that "in the area of healthcare fraud, we must continue to think outside the box and pursue innovative investigative and prosecutorial strategies."<sup>21</sup> In addition, Holder noted that the White House's FY ending 2010 budget called for an increase from nearly \$200 million to \$300 million in the budget for fighting healthcare fraud.<sup>22</sup> Notably, the FY ending 2011 budget includes an additional request of \$250 million in addition to the FY 2010 budget increase, so that the government "is better able to minimize inappropriate payments, close loopholes, and provide greater value for program expenditures to beneficiaries and taxpayers."<sup>23</sup> Holder also made note of additional regulatory and legislative reforms that potentially could be on the way in prosecuting healthcare fraud.<sup>24</sup>

In the legislative arena, President Barack Obama recently signed Pub. L. No. 111-148, the Patient Protection and Affordable Care Act (PPACA), on March 23, 2009, which includes additional tools to combat healthcare fraud and abuse. Specifically, PPACA revises

the intent requirement in the Anti-Kickback Statute so that no proof of actual knowledge of the Anti-Kickback Statute or specific intent to violate the statute is required.<sup>25</sup> In addition, PPACA allows for claims for services in violation of the Anti-Kickback Statute to constitute a false or fraudulent claim under the False Claims Act,<sup>26</sup> and increases the Sentencing Guidance level for healthcare fraud offenses.<sup>27</sup> The inclusion of this language in PPACA reflects the importance being placed by the government on increased healthcare fraud enforcement and could further result in increased liability to physicians.<sup>28</sup>

## Increased Government Enforcement on the Horizon

Overall, the message from the government appears to signal a more expansive and aggressive stance on healthcare fraud enforcement in which individual physicians could increasingly find themselves to be the subject. Although physicians have been subject to enforcement before,<sup>29</sup> the increased attention and funding by the government toward enforcing healthcare fraud, combined with the Kerlan-Jobe, UMDNJ, and Bakst settlements, may illustrate the beginning of an accelerated trend of enforcement actions against individual physicians. While hospitals and other healthcare facilities will likely continue to be targeted by the government, individual physicians may need to start taking a more active role in compliance. Although it is difficult to predict the frequency of enforcement actions involving physicians in the near future, the government appears to be sending a message to the healthcare industry that "under the anti-kickback statute and Stark self-referral law, it takes two to tango."<sup>30</sup>

- 1 Gregg Blesch, *Making Them Pay - High-Cost of Healthcare Reform is Fueling More Fraud Enforcement, Putting Hospitals, Physicians, Other Providers on Notice*, MOD. HEALTHCARE (Oct. 12, 2009) (quoting Lewis Morris, Chief Counsel to the Inspector General, U.S. Dept. of Health and Human Services), available with subscription at [www.modernhealthcare.com/apps/pbcs.dll/article?AID=/20091012/REG/910099990](http://www.modernhealthcare.com/apps/pbcs.dll/article?AID=/20091012/REG/910099990).
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*
- 5 Press Release, U.S. Dept. of Justice, HealthSouth and Physicians Pay \$14.9 Million to Settle Health Care Fraud Claims (Dec. 14, 2007), available at [www.justice.gov/opa/pr/2007/December/07\\_civ\\_1007.html](http://www.justice.gov/opa/pr/2007/December/07_civ_1007.html).
- 6 Press Release, U.S. Dept. of Justice, Los Angeles' Kerlan Jobe Orthopaedic Clinic Pays \$3 Million to Settle Kickback Allegations (Dec. 1, 2009), available at [www.justice.gov/opa/pr/2009/December/09-civ-1294.html](http://www.justice.gov/opa/pr/2009/December/09-civ-1294.html); see also Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and Kerlan-Jobe Orthopaedic Clinic (entered into by Kerlan-Jobe as a condition of continued participation in federal healthcare programs), available at [http://oig.hhs.gov/fraud/cia/agreements/Kerlan\\_Jobe\\_orthopaedic\\_clinic\\_11252009.pdf](http://oig.hhs.gov/fraud/cia/agreements/Kerlan_Jobe_orthopaedic_clinic_11252009.pdf).
- 7 Press Release, U.S. Dept. of Justice U.S. Attorney, District of New Jersey, Three More Cardiologists Settle With Government Over Kickback Related to UMDNJ Cardiology Program (Sep. 17, 2009), available at [www.justice.gov/usao/nj/press/press/files/pdf/umdnj0917%20rel.pdf](http://www.justice.gov/usao/nj/press/press/files/pdf/umdnj0917%20rel.pdf).
- 8 *Id.*
- 9 Press Release, U.S. Dept. of Justice U.S. Attorney, District of New Jersey, UMDNJ to Pay More Than \$8 Million to Settle Kickback Case Related to Cardiology Program (Sept. 30, 2009), available at [www.justice.gov/usao/nj/press/press/files/pdf/umdnj0930%20rel.pdf](http://www.justice.gov/usao/nj/press/press/files/pdf/umdnj0930%20rel.pdf); see also Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and the University of Medicine and Dentistry of

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- New Jersey (entered into by UMDNJ as a condition of continued participation in federal healthcare programs), available at [www.justice.gov/usao/nj/press/press/files/pdf/UMDNJ%20Corporate%20Integrity%20Agreement.pdf](http://www.justice.gov/usao/nj/press/press/files/pdf/UMDNJ%20Corporate%20Integrity%20Agreement.pdf).
- 10 *Supra* note 7.
- 11 Press Release, U.S. Dep't of Justice, Chicago Hospital to Pay More Than \$1.5 Million to Resolve Medicare False Claims Act Allegations, (Mar. 9, 2010), available at [www.justice.gov/opa/pr/2010/March/10-civ-240.html](http://www.justice.gov/opa/pr/2010/March/10-civ-240.html); see also *United States ex rel. Goldberg v. Rush University Medical Center*, No. 1:04-cv-04584 (N.D. Ill.).
- 12 *Id.*
- 13 See Complaint for Damages and Other Relief Under the Federal False Claims Act, *United States ex rel. Goldberg v. Rush University Medical Center and Midwest Orthopedic, LLC*, No. 1:04-cv-04584, (N.D. Ill. filed July 12, 2004); Amended Complaint filed November 1, 2005, named Rush SurgiCenter Ltd. Partnership and Dr. Brian J. Cole as additional defendants. Rush SurgiCenter Ltd. Partnership is a multi-specialty surgery center owned in part by Rush and Midwest physicians. Dr. Cole is a member of Midwest.
- 14 Notice of Intervention in Part and Declination in Part and Joint Stipulation of Partial Dismissal, *United States ex rel. Goldberg v. Rush University Medical Center, Midwest Orthopedics at Rush, LLC, Rush SurgiCenter, Ltd. P'ship, and Brian Cole, M.D.*, No. 1:04-cv-04584, (N.D. Ill. filed March 5, 2010).
- 15 Press Release, U.S. Dep't of Health and Human Services, Office of Inspector General, OIG Enters Into Civil Monetary Penalties Settlement With Former Hospital Executive Director, (Oct. 5, 2009), available at <http://oig.hhs.gov/publications/docs/press/2009/BasktCMPNewsRelease508.pdf>. In 2007 the government entered into a \$1.5 million civil settlement with Community Memorial Hospital resolving the hospital's liability.
- 16 *Id.*
- 17 *Id.* Another noteworthy case involving enforcement against a hospital executives is *United States v. Rogan*, No. 02-C3310, 2006 WL 2860972 (N.D. Ill. Sep. 29, 2006). The United States District Court, Northern District of Illinois, issued a verdict of approximately \$64 million in a False Claims Act lawsuit against Peter Rogan, the former owner and chief executive officer of Edgewater Medical Center (Edgewater), a Chicago teaching hospital. The verdict was based on a finding that Rogan caused Edgewater to submit false claims to Medicare and Medicaid for services to patients referred by physicians with whom Edgewater had prohibited financial relationships that violated the Stark and Anti-Kickback laws.
- 18 Statement of Lewis Morris, Chief Counsel to the Inspector General, U.S. Dep't of Health and Human Services, before the Senate Subcommittee on Federal Financial Management, Government Information, Federal Services and International Security, (April 22, 2009). See also *Senator Tom Coburn Discusses Cost Containment at the White House Health Summit*, WASH POST, (Feb. 25, 2010), available at [www.washingtonpost.com/wpdyn/content/article/2010/02/25/AR2010022502664.html](http://www.washingtonpost.com/wpdyn/content/article/2010/02/25/AR2010022502664.html); Michael Crowley, *Bad Medicine and Out-of-Control Health-Care Fraud*, READER'S DIGEST (Oct. 2009), available at [www.rd.com/your-america-inspiring-people-and-stories/bad-medicine-and-outofcontrol-healthcare-fraud/article163549.html](http://www.rd.com/your-america-inspiring-people-and-stories/bad-medicine-and-outofcontrol-healthcare-fraud/article163549.html).
- 19 Statement of Lewis Morris, *supra* note 18.
- 20 See Helene Cooper and Robert Pear, *Obama Gets Tough on Health Care Fraud*, N.Y. TIMES, (Mar. 10, 2010), available at [www.nytimes.com/2010/03/11/health/policy/11health.html](http://www.nytimes.com/2010/03/11/health/policy/11health.html).
- 21 U.S. Attorney General Eric H. Holder Jr., Remarks at the National Health Care Fraud Summit, (Jan. 28, 2010), available at [www.stopmedicarefraud.gov/innews/holderremarks.html](http://www.stopmedicarefraud.gov/innews/holderremarks.html).
- 22 *Id.*
- 23 Exec. Office of The President, Office of Mgmt. & Budget, Budget of the United States Government, Fiscal Year 2011 (2010), available at [www.whitehouse.gov/omb/budget/fy2011/assets/health.pdf](http://www.whitehouse.gov/omb/budget/fy2011/assets/health.pdf).
- 24 Cooper and Pear, *supra* note 20.
- 25 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § (E) 6401(h) (2010).
- 26 *Id.* at § (E) 6401(g).
- 27 *Id.* at § (F) 10606.
- 28 Other noteworthy PPACA provisions that expand existing healthcare fraud and abuse laws include an amendment to the in-office ancillary services exception under Stark by requiring a referring physician to inform patients in writing, at the time of a referral, that the patients may obtain specified imaging from a person other than the referring physician. PPACA, Pub. L. No. 111-148, § 6003 (2010). In addition, PPACA includes strict limits and restrictions to the Stark Law exception that allows physicians to have ownership interest in hospitals. *Id.* at § 6001. Further, PPACA expands the subpoena power of the Department of Health and Human Services to cases in which a party is alleged to have defrauded federal healthcare programs. *Id.* at § 6402.
- 29 *United States v. LaHue*, 170 F3d 1026 (10th Cir. 1999).
- 30 Blesch, *supra* note 1.

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