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RECENT HEALTHCARE FRAUD AND ABUSE ENFORCEMENT ACTIONS HIGHLIGHT THE IMPORTANCE OF THE VALUATOR'S ROLE

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MODERNIZING MEDICINE

On November 1, 2022, the U.S. Department of Justice (“DOJ”) filed a complaint¹, intervening in a 2017 whistleblower lawsuit, against a South Florida electronic health record (“EHR”) vendor, Modernizing Medicine, Inc. (“ModMed”). The complaint alleges, *inter alia*, that ModMed engaged in a quid-pro-quo kickback arrangement with a diagnostic and pathology laboratory services company, Miraca Life Science (“Miraca”). Specifically, the complaint asserts that ModMed engaged in a “strategic partnership” with Miraca in which ModMed’s EHR platform², which was marketed and sold to third-party healthcare practitioner users, improperly induced and generated referrals directing lab orders to Miraca.³

Furthermore, the DOJ’s complaint asserts that both companies conspired to improperly donate ModMed’s EHR technology in violation of the EHR donation safe harbor.⁴ In particular, the DOJ found that “[f]rom January 2010 until December 2013, Miraca decided whether to make an EHR donation based on the expected value of the business that the donation recipient would generate for Miraca.” Contributing to these efforts, ModMed generated a list of potential “targets,” encouraging Miraca to inform the healthcare practices of the EHR donation opportunity prior to the expiration of the EHR donation safe harbor.⁵

Commensurate with the DOJ’s filing of its complaint, ModMed agreed to resolve the DOJ’s allegations and settled the case for \$45 million on November 1, 2022.⁶

¹ [United States ex rel. Long v. Modernizing Med., Inc.](#), Case No. 2:17-cv-179 (D. Vt.). We note that the filing of the complaint was done contemporaneously with the agreed-upon settlement agreement.

² Designated as the “Electronic Medical Assistant (EMA) [a] cloud-based EHR system. [U.S. v. ModMed](#) at 4.

³ Id. (“To accomplish the goal of inducing ModMed to increase the flow of lab orders that its users sent to Miraca, the parties created an arrangement that (1) provided Miraca with exclusive access to [ModMed’s EHR product’s] laboratory interfaces that would drive ModMed users to Miraca, and (2) financially remunerated ModMed for referring and recommending Miraca to [ModMed’s EHR product’s] users.” at 16.

⁴ During the alleged time period in which this misconduct occurred, the Centers for Medicare and Medicaid Services (“CMS”) had enacted limited exceptions to the Federal Stark and Anti-Kickback (“AKS”) statutes which permit, subject to a myriad of requirements, EHR donations so long as “neither the eligibility of a recipient for the items or services, nor the amount or nature of the items or services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties.” 71 Fed. Reg. 45110 (Aug. 8, 2006) at 45136.

⁵ The safe harbor set forth a limited exception by which pathology laboratories could donate up to 85% of the cost of an EHR system to physicians. [U.S. v. ModMed](#) at 12.

⁶ See DOJ (Nov. 1, 2022) “Modernizing Medicine Agrees to Pay \$45 Million to Resolve Allegations of Accepting and Paying Illegal Kickbacks and Caused False Claims” at <https://www.justice.gov/usao-vt/pr/modernizing-medicine-agrees-pay-45-million-resolve-allegations-accepting-and-paying>.



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COMMUNITY HEALTH NETWORK

Since 2020, HealthCare Appraisers has been monitoring the case in which the DOJ intervened in the qui tam lawsuit brought against Community Health Network (“CHN”) in which CHN was accused of, *inter alia*, “opinion shopping. The DOJ’s complaint asserts that CHN violated the Physician Self-Referral Law (more commonly referred to as the “Stark Law”), thereby implicating the False Claims Act (FCA), when it entered into certain employment arrangements with physicians which involved compensation being paid above fair market value (FMV) for which same compensation was predicated upon those physicians’ achievement of a particular threshold of referral revenues to the hospital.⁷

In its 2020 complaint, the federal government also set forth allegations of CHN having engaged in “opinion shopping,” recounting facts occurring in or around 2008 and which culminated in CHN securing the services of three separate valuation firms in order to secure a favorable opinion with respect to their compensation plans and amounts paid to the employed physicians in question.⁸ In what appears to be another instance of obvious rebuke to the practice of “opinion shopping,” the DOJ’s complaint also detailed how, in each instance, CHN was unsuccessful in obtaining clear support for its proposed compensation plans or compensation amounts, but, regardless, how “[CHN’s] Compensation Committee approved the proposed compensation, even though CHN had not received a favorable FMV opinion from a valuation expert.”⁹ Importantly, in securing the services of one particular valuation firm, the DOJ accused CHN of providing information that “was not in fact accurate or truthful,” which included improper inflation of collections figures consisting of “collections for technical services, in addition to personally performed professional services.”¹⁰

CHN attempted to dismiss the case late last year (2021), which was ultimately denied by the U.S. District Court for the Southern District of Indiana. As such, the case remains ongoing.

CONCLUSION

It is clear from the ongoing CHN litigation that the DOJ emphasizes the importance of the valuator, and valuation firm’s role, in obtaining opinions relating to the FMV compensation of referral-source physicians, as well as the consequences of providing misleading or inaccurate data to the valuation firm. Prudent business practices therefore dictate engaging competent, vigilant, and credible valuation specialists to work with impartial members of the healthcare organization to provide reliable and defensible deliverables. Although external valuations were not directly mentioned in the ModMed pleadings, the use of an experienced valuation expert may have helped the parties avoid the unfortunate outcome that they faced. Since 2000, HealthCare Appraisers has provided its clients with independent, reliable, and defensible FMV analyses and opinions, and has the knowledge and expertise to assist with all aspects of healthcare transactions, ranging from employment to EHR services arrangements.

We encourage you to speak with an expert at HealthCare Appraisers to discuss how we can help your organization.

⁷ *United States and the State of Indiana ex rel. Thomas Fischer v. Community Health Network, Inc., et al.* No. 1:14-cv-1215 (RLY-DKL) (S.D. Ind.). See also DOJ, Office of Public Affairs (Jan. 7, 2020) “United States Files False Claims Complaint Against Community Health Network”, available at <https://www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-community-health-network>. (“[CHN] received referrals from [employed] physicians in violation of the Stark Law and submitted claims to Medicare knowing that the claims for those referred services were not eligible for payment.”)

⁸ *U.S. v. CHN*. at 39. “In June of 2008, CHN and the cardiovascular specialists . . . began to shop for a valuation expert to review the proposed compensation rates for fair market value and reasonableness.”

⁹ *Id.* at 46.

¹⁰ *Id.* at 16 and 39 (after securing the services of a valuation firm to analyze compensation paid and payable to certain of its employed physicians, “CHN knowingly inflated the collections figures it provided to [the valuation firm] to induce a favorable opinion [and] provided [valuation firm] with falsely deflated compensation figures and did not disclose salary guarantees. CHN knew it was paying salaries that exceeded fair market value in violation of the Stark Law.”)

