Gainsharing Structure and Related Legal Issues

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DEFINING SUCCESS TOGETHER

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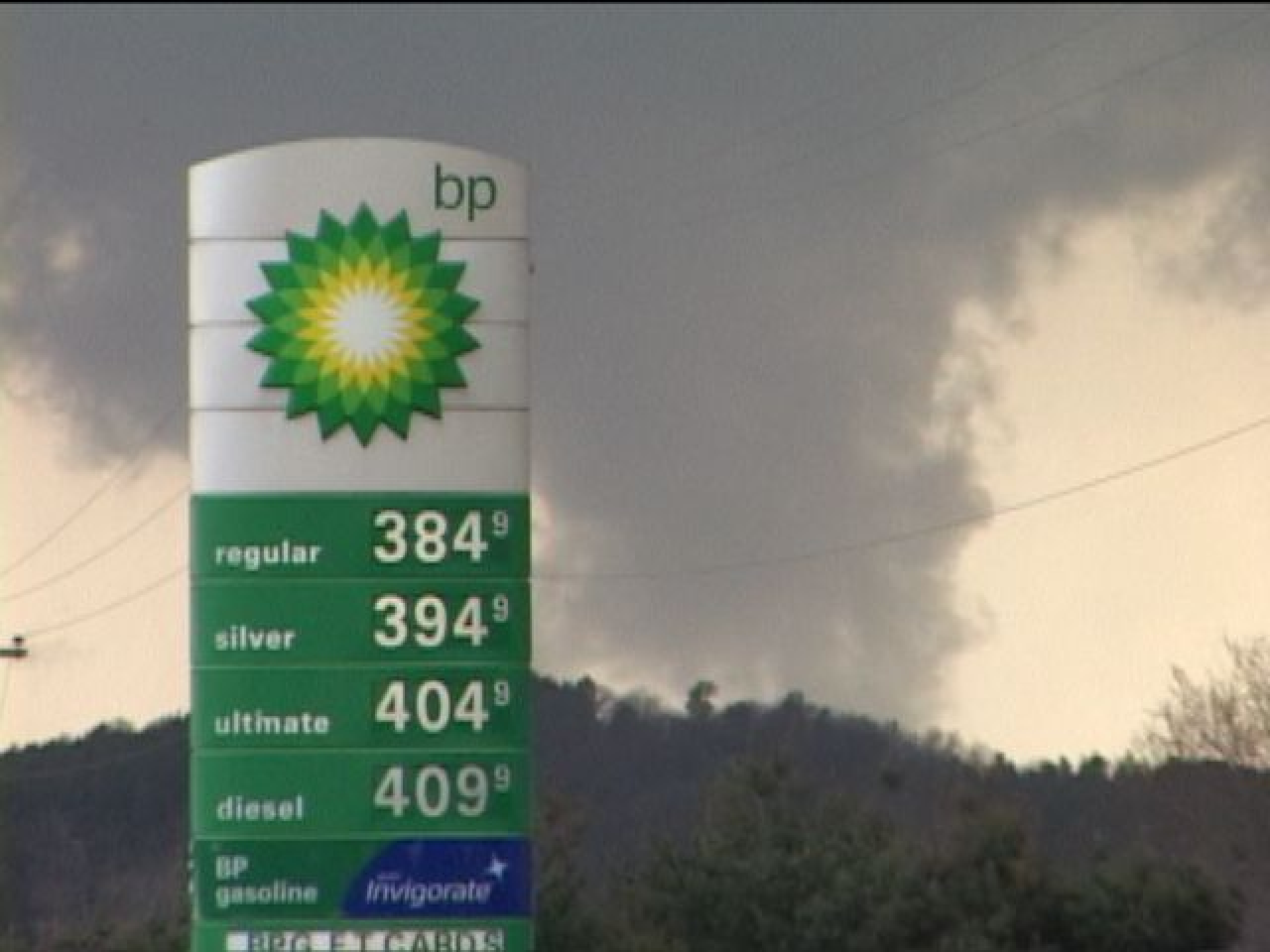
Gainsharing/Shared Savings/Co-Management/Alignment Your Label Here!

- What is it?
- Labels don't really matter. What is "Shared Savings"??

Shared Savings

- Goal is reducing waste.
- Savings may be from conservation.
  - Avoiding drug wastage.
  - Avoid using costly service.
- Savings may come from standardization.
- Payment for efficiency is kosher, and popular.
- Savings from lower costs implants.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silver 394.9
ultimate 404.9
diesel 409.9
BP gasoline
invigorate

CMS Worries About

- Limiting use of quality-improving but more costly devices, tests or treatments: “stinting.”
- Treating only healthier patients: “cherry picking.”
- Avoiding sicker patients: “steering.”
- Discharging patients earlier: “quicker-sicker.”

CMS Seeks to Encourage

- Transparency.
- Quality controls.
- Safeguards against payments for referrals.

Gainsharing/Shared Savings/Co-Management/Your Label Here!

- Labels do not matter, but…
- Law DOES matter.
- Federal law prohibits payments intended to reduce services to Medicare beneficiaries.
- The government used to say gainsharing was illegal. That is totally last century.
- It is 100% clear that gainsharing/shared savings can be done legally.

Gainsharing/Shared Savings/Co-Management/Your Label Here!

- At least 16 favorable OIG Advisory Opinions, starting in 2001.
- "Pending further notice from the OIG, gainsharing arrangements are not an enforcement priority for OIG unless the arrangement lacks sufficient patient in-program safeguards." 79 F.R. 59715, 59729 (Oct. 3, 2014).
- The advisory opinions offer guideposts:
  - Payment caps.
  - Utilization targets.
  - Disclosure.
  - Hourly payments are low risk.

How Do You Split the Savings?

- The Advisory Opinions are 50-50.
- Advisory Opinions are not law, but they are useful guidance.
- CMS worries when payments exceed the Medicare fee schedule payments.
- Know the 4 big laws.

The 4 Big Laws

- Stark – civil but you MUST meet an exception.
- Antikickback – Criminal, but you don't need to meet a safe harbor. Intent controls.
- Tax Exemption.
- Antitrust.

Can You Have Long Term Payments?

- The conventional wisdom limits payments to one year.
- But see Advisory Opinion 12-22. “The management agreement is written with a three-year term, and thus is limited in duration.”
- Some people claim it only addresses co-management. They’re wrong.
- The payment must be reasonable.

Co-Management Details

- Do you need a new entity?
- Make sure the terms are clear.
- Can physicians really control the key payment factors.
  - Press-Gainey scores?
  - Turn-around times?
  - Scheduling?
  - Staff turnover?
  - Implant use?

The Hidden Trap

Gainsharing: Good Idea Goes Bad

According to her lawsuit, Kathleen Davis suffered a significant complication after having a Medtronic pacemaker implanted at Methodist in 2004. She said that her cardiologist made a startling confession when she asked what happened to cause a twitching in her abdomen.

A Good Idea Goes Bad

He told her that she probably would have fared better with another brand of pacemaker, but that Methodist administrators had leaned on him to install the Medtronic model to help the hospital collect on what he called a kickback deal, the lawsuit said.

- Des Moines Register, Feb. 9, 2006.

Think Before You Type

"Frank [the physician] has made no attempt to comply with the contract. . . I am prepared to reschedule his devices to be in compliance with the contract," wrote Tim Nelson, a hospital manager who has since left the company, in one e-mail obtained from the court file.

- Des Moines Register, Feb. 9, 2006.

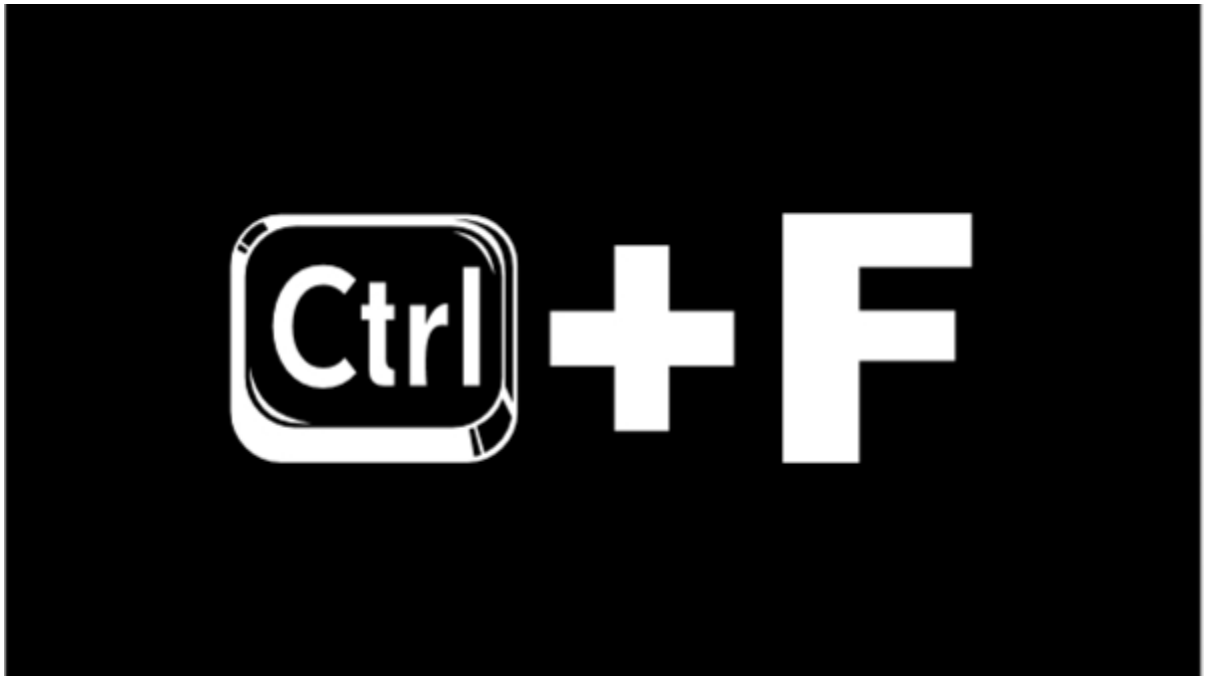
Think Before You Type

In another e-mail in the court records, Butz [another administrator] wrote: "Frank did say . . . that he would abide by a contract that paid him money for compliance." In the e-mail, which Butz wrote to Methodist's chief operating officer, David Stark, he said, "Isn't there a joke along these lines — now that we have established what he is, we are simply negotiating over price."

- Des Moines Register, Feb. 9, 2006.

A Final Word About Documents

- Bad Documents.
  - Can and will be used against you in litigation.
  - When litigation or an investigation is reasonably anticipated, you cannot destroy documents.
  - See the firm f/k/a Arthur Anderson….



What is a Document?

- Anything on paper.
- Any electronic record (including text messages).
- Stored anywhere (hard drive, phone, company servers, home computer).
- Voicemail.

Communications Ground Rules

- Focus on:
  - Effect on patients.
  - Quality.
  - Access.
  - Efficiencies.
- Assume a document lasts forever.
- You may be writing for an audience.

The Bottom Line

- Hospitals will care about the Bottom Line!
- How you say things really matters.
- Bundled payments are likely here to stay. Cost pressure isn't likely to abate.
- Device companies should be wary of direct involvement. Discounted devices seem quite defensible.

The Bottom Line

- Savings are good. Hospitals offering or physicians receiving financial incentives for savings is legal, and wise. Just be smart.
- Shared savings is no riskier than many other practices.

4. Good Examples

Good #1: OIG Advisory Opinion 12-22

- **Facts:**
  - A hospital contracts with local cardiology group to assist in the management of its cardiac cath labs.
  - Hospital pays (1) hourly service fees; and (2) performance bonus for implementing patient service, quality, and cost-savings measures.
  - Performance measures involve:
    - Patient satisfaction.
    - Employee satisfaction.
    - National quality improvement measures.
    - Cost savings (standardization and device limitation).

Good #1: OIG Advisory Opinion 12-22

Result: OIG finds that the arrangement implicates the AKS and CMP laws, but poses a low risk of fraud and abuse. No sanctions are imposed.

- **What went right?**
  - Compensation was fair market value.
  - The group provided substantial services, minimizing the risk of payments for referrals.
  - Compensation did not vary with the number of patients or referrals.
  - The group already used hospital's labs for all its cardiac cath procedures (no other cath labs in town).
  - Hospital monitors for inappropriate reductions in care.

What went right?

- Physicians still free to access other devices or supplies of their choosing.
- Incentive payment is based on aggregate performance, and is capped.
- Incentive fee is conditioned upon the group not: (1) stinting on care; (2) increasing referrals to hospital; (3) “cherry-picking” healthy or insured patients; or (4) accelerating patient discharges.

Good #2: Advisory Opinion 08-17

- **Facts:**
  - Private insurer implements quality program that pays hospital a 4% bonus for achieving two data reporting and four quality standards related to patients admitted for one of six specific conditions or procedures.
  - Hospital creates incentives for physicians to help hospital achieve the quality standards.

Good #2: Advisory Opinion 08-17

Result: OIG finds that the arrangement implicates the AKS and CMP laws, but poses a low risk of fraud and abuse. No sanctions are imposed.

- **What Went Right?**
  - Participation open to all physicians who have been on medical staff for at least one year (not just high referrers)
  - Physician incentive is subject to a cap
  - Distribution of incentive payments to groups is made on a per capita basis
  - Quality standards derived from The Joint Commission and CMS
  - Program limited to a three-year term, and payments in subsequent terms are not be based on prior year performance.

Good #3: Gainsharing Advisory Opinions

- **Facts:**
  - Beginning in 2001, the OIG has published Advisory Opinions evaluating 14 gainsharing programs under AKS and the CMP law.
  - In these opinions, the OIG's analyzes:
    - If the gainsharing arrangement allows hospitals to offer disguised payments to participating physicians for referrals.
    - If the hospitals are paying physicians to reduce or limit services or supplies in a way that will adversely affect quality and patient care:
      - "Stinting" on patient care.
      - "Cherry picking" healthy patients.
      - "Steering" sick patients away.

Good #3: Gainsharing Advisory Opinions

Result: The gainsharing programs that received favorable treatment from the OIG share several characteristics.

- Written contract.
- Program has a fixed term, re-evaluates regularly.
- Participating physicians have hospital privileges.
- Specific cost-savings opportunities based on physicians' historical practices.
- Oversight by a hospital committee.
- Payment methodology.
  - Percentage of savings realized.
- Efficiency measures relate to decreasing waste.
  - Product standardization.
  - Product substitution.
  - Utilization management.
- Safeguards against inappropriate reductions.
  - Non-program items can be selected for medical necessity.
  - Savings floor.
- Disclosure to patients.

Summary: Ask Yourself…

1. **Why are we doing this?**
   - Remember the "one purpose" test
2. **Why choose these partners?**
   - Are they qualified?
   - Are they a rich referral source?
   - Why aren't others included?
3. **Are the services reasonable?**
   - Do we need these services?
   - Are they duplicative?
   - Are the services justified in scope and amount?
   - Are they sufficient to justify the payments?
4. **Is compensation appropriate?**
   - Is the payment fair market value?
   - Are incentives capped?
   - Is there a floor on savings payments?
   - Based on individual or group performance?
5. **Is performance monitored?**
   - By which personnel or committee
   - Quality
   - Time

QUESTIONS?

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