PUBLICATION

Criminal Prosecutions of Health Care Fraud: The Stakes Continue to Rise for Individual Provider [Ober|Kaler]

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On June 18, 2015, the U.S. Department of Justice (DOJ), in collaboration with the U.S. Department of Health and Human Services (HHS), announced criminal charges against 243 individuals located in 14 states for various health care fraud-related offenses, including health care fraud, conspiracy to commit health care fraud, and violations of the antikickback statute. Touted by DOJ and HHS as "the largest criminal takedown in the history of the Department of Justice,"[1] the medical professionals charged included doctors, nurses, and physical therapists. The schemes charged resulted from cases being prosecuted and investigated by the Medicare Fraud Strike Force, teams of prosecutors and law enforcement agents who, since 2009, have banded together to focus on enforcement of anti-fraud laws under a Health Care Fraud & Enforcement Action Team Initiative (HEAT). The HEAT teams who participated in these investigations employed proactive data analysis. In addition, this take down involved more than 900 federal, state and local law enforcement agencies who collaborated to execute the arrests over a three-day period.[2]

The government alleges that the fraudulent schemes involved more than $700 million in false *billings (not payments)*.[3] As part of its latest enforcement effort, this HEAT sweep focused on fraud that allegedly related to the Medicare Part D prescription drug program, the delivery of home health services, and the delivery of Medicaid Personal Care Services.

Many of the charges relate to how the defendants purportedly submitted claims to Medicare and Medicaid for medically unnecessary services, and, in some instances, how kickbacks were paid in exchange for patient referrals. For instance, in the case of *United States v. Laran Lerner*, Dr. Lerner was charged in a $24 million scheme for allegedly providing medically unnecessary prescriptions for drugs which his co-defendant, a pharmacist, allegedly billed Medicare yet never dispensed. Dr. Lerner also allegedly billed Medicare for medically unnecessary office visits, and also referred patients for medically unnecessary home health services.[4] In the case of *United States v. Aaron Goldfein, MD, et al.*, Dr. Goldfein and three owners of a home health care company were charged with submitting fraudulent claims to Medicare by billing for medically unnecessary home visits, and billing for medically unnecessary home visits for which the referrals for services were obtained through the payment of kickbacks to beneficiaries and beneficiary recruiters.[5]

Other investigations and prosecutions related to the provision of medically unnecessary physical and occupational therapy services, which were allegedly provided to beneficiaries induced by cash kickbacks to request medically unnecessary services from doctors and physical and occupational therapists. *See United States v. Olga Proskurovsky et. al*, Criminal No. CR-15-291 (E.D.N.Y).

Still other prosecutions related to a fraudulent billing scheme allegedly perpetrated by physical therapists, occupational therapists and others, whereby they increased demand for medical services by providing Medicare beneficiaries with free massages, lunches, and recreational classes, and submitted to Medicare claims for unnecessary medical services that often were not provided or otherwise. *See United States v. Suh, et al.*, Criminal No. CR-15-300 (E.D.N.Y.)

Ober | Kaler's Comments

This recent take down illustrates that the government will continue to aggressively pursue individual health care practitioners whom it believes have engaged in fraud. Following the passage of the Patient Protection and Affordable Care Act of 2010, federal prosecutors are now armed with more firepower in the form of amendments to the U. S. Sentencing Guidelines to argue that a convicted defendant should face more jail time. Because federal judges must consult the Federal Sentencing Guidelines to determine a defendant's sentence, judges are now allowed to consider "the aggregate dollar amount of fraudulent bills *submitted (not paid)* by a government health care program."[6] Federal judges are also allowed to consider sentencing a defendant to a greater amount of jail time simply because he or she was convicted of committing a health care fraud offense.[7] The practical effect of these amendments is that a defendant could end up serving twice as much time in jail for committing health care fraud, even up to a sentence of life imprisonment.

It might be tempting for a provider to focus just on the factual allegations in these cases and to dismiss them as outrageous outliers. But by doing so, a provider might miss the larger message that federal and state prosecutorial agencies, armed with ample financial and investigative resources, continue to focus on individuals and entities whom it contends deliver medically unnecessary services, and services that it believes are tainted by kickbacks. Providers would be well advised to heed the warning signs by proactively ensuring that they maintain detailed and accurate medical records that establish that services were, in fact, provided as claimed, and to ensure that their referrals of patients are legitimate and not subject to scrutiny for being illegal kickbacks.

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1 *See* Remarks by Attorney General Loretta E. Lynch at: http://www.justice.gov/opa/pr/national-medicare-fraud-takedown-results-charges-against-243-individuals-approximately-712.

2 *See* https://oig.hhs.gov/fraud/enforcement/files/Fact_Sheet_Takedown_6_8_2015.pdf [PDF].

3 *See* https://oig.hhs.gov/fraud/enforcement/files/Fact_Sheet_Takedown_6_8_2015.pdf [PDF].

4 *See* http://www.justice.gov/usao-edmi/pr/sixteen-charged-detroit-area-part-largest-national-medicare-fraud-takedown-history.

5 *See* http://www.justice.gov/usao-edmi/pr/sixteen-charged-detroit-area-part-largest-national-medicare-fraud-takedown-history.

6 *See* U.S. Sentencing Commission Guidelines Manual, §2B1.1, n.3(F)(viii)(Nov 1, 2014).

7 *See* U.S. Sentencing Commission Guidelines Manual, §2B1.1(b)(7) (Nov 1, 2014).