The Growing Reach of Fraud and Abuse Cases

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THE GOVERNMENT'S WAR against healthcare fraud and abuse is continuing at full speed. In fact, the government is widening its sights to go after claims to private third-party payors.

The government can prosecute all healthcare fraud.

Most physicians are aware that the federal False Claims Act applies to federally funded programs such as Medicare and Medi-Cal. But there is a widespread perception that the federal government has no jurisdiction to prosecute false claims submitted to private payors, such as insurance carriers.

Wrong. A little known provision in HIPAA (the Health Insurance Portability and Accountability Act of 1996) allows the government to criminally prosecute any " scheme or artifice" to defraud — or obtain money by false representations — from any health care benefit program. (18 U.S.C. section 1847.) Federal prosecutors have emphasized that they view section 1847 as giving them the ability to prosecute essentially " false claims" cases against private payors. Also, insurance companies are taking aggressive measures to combat private fraud.

Physicians who do not treat Medicare or Medi-Cal patients are vulnerable. It is essential as a practical matter that all physicians and physician organizations that bill any third party payors have effective compliance plans.

The war against terrorism will not hinder fraud and abuse actions.

After September 11, many prosecutorial resources were pressed into service in the war against terrorism. Government officials now emphasize that attention to healthcare prosecutions has not drifted and that prosecutorial staffing of such cases is back at the pre-September 11 levels.

The government tracks its success in the healthcare arena by criminal convictions, dollars recovered in civil monetary penalties, and exclusions from Medicare. It expects all three items for 2002 to equal or surpass 2001 levels. In 2001, approximately 3,600 professionals were excluded from Medicare. The government anticipates that approximately 4,000 people will be excluded in 2002. This signifies vigorous law enforcement activity in healthcare.

For 2002, the top areas of governmental concern for physicians have been: Evaluation and Management coding, reassignment of physician benefits, and psychiatric treatment. In addition, the government has special projects focusing on patients in nursing homes and on clinical trials. In terms of legal violations, the government's priorities are on what prosecutors call " lies, bribes and perks" — i.e., violations of, respectively, the False Claims Act, the anti-kickback statute, and the Stark self-referral act and regulations.

Which cases are pursued?

Many in the healthcare industry believe the government pursues too many meritless cases. Even so, prosecutors have too many potential cases and must prioritize.

Cases begin with a complaint, or referral, that a physician is violating the law. The four main sources of referrals are:
• Medicare-related personnel, such as CMS (the Center for Medicare and Medicaid Services) or contractors discovering patterns of questionable billing; • law enforcement personnel, such as FBI agents working other cases and coming across relevant information; • employees who know of improper billing activities, have contacted lawyers and become qui tam " whistleblowers"; and • patients who believe their bills are improper.

Once complaints and referrals are screened for merit, significantly more cases remain than can be worked. Prosecutors then manage their caseloads by focusing on the potential for success. They weigh the effort it will take to prosecute the case; the likelihood of success and the potential for imprisonment, civil monetary penalties and exclusions if they are successful.

Does this mean prosecutors focus only on the "big fish?" Not at all. They are pleased to push relatively small cases where the issues and the evidence appear clear-cut or when it involves a priority issue, such as quality of care.

Small to medium cases often appear to be in a " gray area"; after initial investigation, the prosecutor has contacted the target's attorney but has yet to file an action. Defense counsel may attempt to show the "other side of the story," to demonstrate that the case is not what it may first have appeared. Months may go by without communications. But this does not mean the case has gone away. It may be on the back burner for a while — even a long while — but prosecutors are well aware of when the statute of limitations will run. At some point, the case will almost certainly become hot again.

Fraud and abuse cases typically involve both a local federal prosecutor — an Assistant United States Attorney (AUSA) — and the Office of Inspector General (OIG) of the federal Department of Health and Human Services (HHS). If there is to be a settlement, typically the target physician must negotiate a civil settlement (usually involving monetary penalties) with the AUSA,and must separately negotiate a Corporate Integrity Agreement (CIA) with the OIG. The local U. S. Attorney's Office usually approves a civil settlement, while high-level Washington, D.C., OIG officials negotiate the CIA.

OIG officials now plan to decentralize their process, giving more authority to area offices. The Inspector General, Janet Rehnquist (the daughter of Supreme Court Chief Justice William Rehnquist), has said that the OIG will streamline the settlement process and will reduce the financial impact of CIAs. Also, she said, the OIG may allow some targets to settle cases with the local AUSA and not have to enter into a CIA. While some commentators have heralded the coming of a " kinder and gentler" OIG, only time will tell. Finally, OIG is becoming more mobile, transferring in agents as needed on short term teams to work active cases.

Enforcement is here to stay.

The government is continuing to devote massive resources into fraud and abuse enforcement, and is doing so in more sophisticated ways. The pipeline of cases is full — now and for the foreseeable future. While the negotiations may become somewhat more decentralized in some cases, physicians must still ensure they have effective compliance plans.

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