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Recent Developments in Federal and State Fraud and Abuse Investigations



Jack Wenik

by Jack Wenik

The emphasis and targets of Federal and State fraud and abuse investigations constantly shift in response to statutory/regulatory changes, political changes, and changes in the healthcare landscape. The Department of Justice (“DOJ”) under the Biden Administration has altered its enforcement priorities generally, and in the healthcare space particularly, with varying degrees of success. The recent election of a Republican-controlled House of Representatives has also had an important effect of putting the brake on some major proposed statutory/regulatory changes in the healthcare space. Perhaps most importantly, Secretary of Health and Human Services Xavier Becerra announced, effective May 11, 2023, the end of the Public Health Emergency, which had been imposed as a result of COVID-19.¹ All of this has had significant effects on fraud and abuse investigations.

Medicaid Beneficiary Fraud

One of the consequences of the imposition of the COVID-19 public health emergency (“PHE”) was that, per the instructions of CMS, for the duration of the PHE, states were required to maintain the enrollment of all Medicaid enrollees. The results were predictable. Medicaid rolls ballooned to a record 85 million individuals. Because of the moratorium on eligibility redeterminations, 24 million people were added to the rolls.² According to the Urban Institute, 15 million Medicaid enrollees nationally are ineligible for benefits.³

The end of the PHE brings with it the elimination of the moratorium on eligibility determinations. As a result, in New Jersey, eligibility redeterminations for 2 million people began on April 1, 2023.⁴ Thus, we can expect in the future that many thousands of individuals who do not qualify for the program because of their income or assets will ultimately be purged from the Medicaid rolls. While to be sure, many of

these enrollees did not act with fraudulent intent, others did. Criminal Medicaid Fraud Control Units typically limit their activities to investigating provider, not beneficiary fraud. Investigating beneficiary fraud is left to other regulatory entities or local prosecutors’ offices. In New Jersey, the civil Medicaid Fraud Division of the Department of State has conducted beneficiary fraud investigations in the past. With the lifting of CMS’s moratorium on eligibility redeterminations, we can expect them to do so again.

Also of interest on the Medicaid beneficiary front is the continuing saga of “Work for Medicaid.” As this author has noted in prior issues of *Garden State Focus Magazine*, a rapidly expanding effort to impose work requirements on able-bodied Americans receiving Medicaid benefits was dramatically reversed with the election of President Biden. The Biden Administration, however, has not been entirely successful in this regard. Georgia successfully litigated the federal government’s attempt to cut-off its Medicaid work requirements. While Georgia’s program began in the summer of 2023, it is yet to be seen whether it will produce any fiscal savings.⁵

“Work for Medicaid” continues to be a goal of Republican legislators. Republicans pushed for the enactment of nationwide “Work for Medicaid” requirements as part of the debt ceiling negotiations.⁶ While unsuccessful in their initial efforts to implement the “Work for Medicaid” concept, it is unlikely that Congress will give up on the initiative. The costs of Medicaid are enormous and on a continued upward trajectory, making the enactment of some sort of reform essential.

For providers, this new focus on beneficiaries makes it of the utmost importance to verify the Medicaid eligibility and coverage of patients. In extreme cases where providers turn a blind eye to beneficiary fraud, they could face potential exposure as accessories to beneficiary fraud. Finally, if “Work for Medicaid” programs

are enacted, with their accompanying requirements to document work, community service or educational efforts, it opens up an entirely new category of fraud and abuse investigations.

Department of Justice Initiatives

On February 22, 2023, pursuant to the direction of Deputy Attorney General Lisa O. Monaco, a uniform Voluntary Self-Disclosure Policy was promulgated for United States Attorney's Offices.⁷ This development is important for corporate and other organizations that provide healthcare services. Pursuant to the policy, a United States Attorney's Office will **not** seek a corporate guilty plea from those entities that have promptly self-disclosed, cooperated fully with the government's investigation, and remediated the criminal conduct at issue, absent other aggravating factors.⁸ Of course, as with all government policies, the "devil is in the details" and, for example, whether or not disclosure has been "prompt," or an organization has "fully" cooperated with a government investigation will no doubt be the subject of some debate in particular cases. Nevertheless, the promulgation of formal standards wherein the federal government will not prosecute certain criminal conduct is a significant development that in-house counsel and compliance officers should follow closely.

With regard to healthcare fraud, DOJ's focus is on illegal opioid prescriptions, COVID-19 related fraud, and telemedicine fraud (which is closely linked to fraud regarding clinical laboratories and durable medical equipment ("DME")). In 2022, DOJ formed yet another unit to combat illicit opioid distribution, the New England Prescription Opioid Strike Force or "NEPO." This unit joins several others such as the Appalachian Regional Prescription Opioid Strike Force, "ARPO" in tackling the illegal opioid trade. Needless to say, all providers must track opioid prescriptions and the documentation for same diligently and take prompt action if suspicious prescribing patterns are observed.

The advent of COVID-19 has made telemedicine more mainstream, and CMS has loosened previous restrictions regarding access and reimbursements for telemedicine. No doubt this is, for the most part, a positive development, increasing access to healthcare services and in many cases reducing costs. On the negative side, because telemedicine is more difficult to monitor and verify, it is inherently more susceptible to fraud. This has been particularly true with regard to authorizations for genetic testing, often referred to as CGX, which have been the subject of DOJ's operation "Double Helix," ongoing since 2019. DOJ statistics for 2022 allege \$1.2 billion in fraud related to telemedicine fraud.

As for COVID-19 fraud, the Coronavirus Aid, Relief, and Economic Security Act ("CARES") passed in March 2020, along with other relief measures, provided enormous sums of government money intended to protect the economy. Wherever there is a large government funded relief program, fraud surely follows. COVID-19 is no different except perhaps for

the scale of the thefts/fraud being perpetrated. DOJ statistics for the first few months of 2023 allege \$490 million in fraud related to COVID-19.

Finally, at the federal level, one of the most significant developments in healthcare fraud investigations is the recent unanimous Supreme Court decision in *Dubin v. United States*.⁹ In *Dubin*, the Supreme Court considered the appropriateness of applying aggravated identity theft¹⁰ to a run-of-the-mill overbilling case by a psychologist submitting improper bills to Medicaid. Aggravated identity theft carries a two-year mandatory prison sentence and federal prosecutors routinely used this charge as leverage in plea bargain negotiations for a wide variety of healthcare fraud prosecutions.

In *Dubin* the government argued that because patients' Medicaid reimbursement numbers were used as part of the billing fraud, aggravated identity theft applied. The Supreme Court unanimously rejected this noting that the government's theory would allow the use of this charge in every overbilling case. Instead, the Court held that the use of another person's identification must be the crux of what makes the conduct criminal. The *Dubin* decision thus levels the playing field somewhat, removing the threat of mandatory incarceration previously wielded by the prosecution in virtually all false or overbilling cases.

Data Security Issues

Since the implementation of HIPAA's privacy, security and breach enforcement rules in the early 2000s, it goes without saying that a healthcare provider of any appreciable size must maintain robust data security procedures. Developments of the past several months show that this is a topic increasingly on the minds of prosecutors and government regulators.

In March of 2023, the DOJ revised its guidelines for evaluating corporate compliance programs.¹¹ Of particular interest is the guidelines' emphasis on the accessibility, preservation and security of electronic information and communications. This applies not only to the databases and equipment of the company/organization but also to the personal devices of employees who use them for work purposes.¹²

Government officials expect healthcare providers to be proactive in the protection of data, particularly individuals' personal health information, or face administrative and other enforcement proceedings. An example of this is reflected in the Federal Trade Commission's ("FTC") July 20, 2023 warning letters sent to numerous hospital systems and telehealth providers.¹³ The FTC letter cautioned healthcare providers to disable tracking technologies present on their mobile applications and websites lest they reveal consumers' personal health information to third parties.

The takeaway? Healthcare providers cannot assume that inadvertent data security lapses will not subject them to govern-

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ment enforcement actions or scrutiny. Rather, robust protections must be in place and proactive policies and procedures employed. Otherwise, even inadvertent data security lapses will create exposure for providers.

The Antitrust Division's War Against Healthcare Providers

The election of President Biden brought a significant change in United States antitrust policy. In a dramatic departure from prior administrations, antitrust enforcement has been brought to the forefront at both the FTC and the DOJ's Antitrust Division. Mergers are now subject to intense scrutiny. In the healthcare space this was demonstrated by last year's failed merger of Saint Peter's Health Care System and RWJBarnabas Health in the face of opposition by the FTC. Less well known is the Antitrust Division's new criminal focus on the healthcare industry.

In October 2016 the FTC and the Antitrust Division released guidance for human resource professionals.¹⁴ The guidance cautioned companies/organizations that agreements to fix wages and/or not to hire competitors' staff ("no-poach" agreements) were illegal. Indeed, even the sharing of wage information with other companies could be problematic.

While not specifically addressed to healthcare companies/entities, these guidelines have received new emphasis in the healthcare space during the Biden administration,¹⁵ with a slew of criminal cases alleging theories of either wage-fixing or no-poach agreements being brought against healthcare companies/providers.

The results to date have been a disaster for the Antitrust Division with multiple acquittals during or after trial in the cases brought so far. No less than 5 major healthcare antitrust prosecutions have resulted in acquittals in 2022 and 2023. Indeed, the Antitrust Division has yet to succeed at trial in any wage-fixing or no-poach prosecution against a healthcare provider.

Nevertheless, the Antitrust Division continues to bring these sorts of cases and shows no sign of backing away from these theories of liability. Healthcare entities must be vigilant not to share wage or other sensitive employee information with other companies, even if they may not, at first glance, seem to be direct competitors.

Conclusion

Fraud and Abuse investigations in the healthcare space will only increase as this industry consumes a greater and greater proportion of government spending. Moreover, as political winds and priorities shift, so too will the emphasis and targets of such investigations change. Robust compliance and risk management functions are an indispensable necessity for all healthcare providers.

About the Author

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Footnotes

¹Letter to U.S. Governors from HHS Secretary Xavier Becerra on renewing COVID-19 Public Health Emergency. February 9, 2023, located at: <https://www.hhs.gov/about/news/2023/02/09/letter-us-governors-hhs-secretary-xavier-becerra-renewing-covid-19-public-health-emergency.html>.

²Wall Street Journal, August 15, 2022, Lead Editorial, *The Government's Stealth Health Takeover*.

³Urban Institute, *What Will Happen to Medicaid Enrollees' Health Coverage after the Public Health Emergency*, March 2022 at 2.

⁴Jennifer Langer Jacobs, *NJ Medicaid Resumes Eligibility Determinations April 1*, Garden State Focus Magazine, Winter 2022.

⁵See, e.g., Pifer, Rebecca, *Georgia's Medicaid work requirements pricier, more restrictive than full expansion*. June 30, 2023, Healthcare Dive.

⁶See, H.R. 1551 introduced in the House of Representatives on March 10, 2023.

⁷The new policy can be found at: https://www.justice.gov/d9/2023-03/usao_voluntary_self-disclosure_policy_2.21.23.pdf.

⁸*Id.* at 4.

⁹*No. 22-10* (decided June 8, 2023).

¹⁰See, 18 U.S.C. § 1028A(a)(1).

¹¹DOJ's Evaluation of Corporate Compliance programs can be found at: <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

¹²*Id.* at 17-18.

¹³The FTC's warning letter can be found at: https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-OCR-Letter-Third-Party-Trackers-07-20-2023.pdf.

¹⁴Antitrust Guidance for Human Resource Professionals can be found at: <https://www.justice.gov/atr/file/903511/download>.

¹⁵See, Executive Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021) (emphasizing antitrust enforcement in labor markets). See, also, December 9, 2022 DOJ Press Release announcing Memorandum of Understanding between the Antitrust Division and OIG for increased sharing of information/antitrust enforcement in healthcare markets. Located at: <https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-office-inspector-general-department-health-and>.