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Weekly News and Compliance Strategies on Federal Regulations, Enforcement Actions and Audits

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Broader Enforcement Puts Providers on Alert; Feds Use Travel Act, Payers Sue Providers

It sounds like something fun you do over the summer, but the Travel Act is deadly serious: It's a longstanding law that federal prosecutors have recently applied in health care cases, and a manifestation that health care organizations are facing new enforcement tools, sometimes outside the familiar realm of the False Claims Act and Stark Law, as well as private enforcement actions.

The government and commercial insurers are pursuing health care fraud, often using sophisticated data analytics, in different ways, attorneys say. Sometimes it's the ramped up use of the Travel Act, which comes from the Racketeering chapter of the federal criminal code. There also are more audits and/or investigations by state and federal government agencies, including TRICARE, workers' compensation programs and Medicaid managed care organizations, said Dallas attorney Sean McKenna, who spoke at a Health Care Compliance Association webinar on June 21. Meanwhile, the Department of Justice announced in early June that it is hiring more than 300 attorneys for all types of prosecutions.

"Providers need to include non-traditional government enforcement players in their compliance efforts," said Dallas attorney Brad Smyer, with Alston & Bird, who spoke at the webinar. "Historically, compliance has focused primarily on Medicare and Medicaid and that makes sense—they are primary risk areas. But we're seeing a lot more nontraditional enforcement. Those are things compliance programs may not traditionally touch on. We need to be better about including compliance officers and assessing those areas like any other claims."

This is driven partly by the government's success in traditional Medicare and Medicaid enforcement. "Health care enforcement has become a primary funding mechanism for a lot of government services, especially as Medicare and Medicaid have had success and use phrases like 'return on investment,'" Smyer noted. "I suspect other government agencies are taking note and upping their enforcement."

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The Travel Act, which was enacted under President John F. Kennedy, "has popped up fairly recently in a number of high-profile cases," Smyer said. It's being used to prosecute kickbacks. The law is unique because "you don't have to commit unlawful activities" to violate the Travel Act; you just have to promote unlawful activity. The Travel Act prevents the use of mail or interstate/foreign travel or commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity." He says "unlawful activity" includes "bribery…in violation of the laws of the State in which committed or of the United States."

The Travel Act was applied in a 2016 case against physician-owned Forest Park Medical Center, an out-of-network hospital in Dallas *(RMC 12/12/16, p. 5)*. Physicians allegedly were paid kickbacks to refer patients "with high reimbursing out-of-network private insurance benefits or benefits under certain federally-funded programs," the U.S. attorney's office said, and to "sell" Medicare and Medicaid patients to other hospitals, according to the indictment, which alleged that $40 million in bribes were paid from 2009 to January 2013. The hospital, which is now out of business, is not being prosecuted. Out-of-network hospitals don't accept reimbursement rates set by insurers and are free to set their own prices. Smyer said Forest Park Medical Center's main payers were TRICARE and the Federal Employees' Compensation Act (FECA), which is a program for work-related injuries or disease—not Medicare and Medicaid.

Forest Park was founded by Richard Ferdinand Toussaint Jr., an anesthesiologist; Wade Neal Barker, a bariatric surgeon; Alan Andrew Beauchamp, chief operating officer; and Wilton McPherson Burt, a managing partner—all of whom were charged—and was managed by Burt and Beauchamp, according to the indictment.

Hospital Founder Was Convicted

For example, Beauchamp, Toussaint, Barker and Burt allegedly paid surgeons for referring patients to the hospital for procedures, with an emphasis on high-paying surgeries, such as spine and bariatric surgeries, the indictment alleged. Surgeons were asked how many procedures they did a month and the number of out-of-network cases they could steer to the hospital. About 40 primary care physicians also allegedly received $500 a month in kickbacks from the "certain coconspirators" to refer their patients to the surgeons or the hospital, the indictment states.

Smyer said 21 executives, physicians and others were charged with violations of the Travel Act and Anti-Kickback Statute. Toussaint Jr. and some of the others pleaded guilty to Travel Act violations, while trials of other people are pending.

"The primary payers were TRICARE and workers' comp," Smyer said. "The interaction between the payers and DOJ is robust." TRICARE and workers' comp programs have their own enforcement agents and inspectors general, he notes.

The Travel Act was used in two other recent major health fraud prosecutions. Biodiagnostics Laboratory Services (BLS) in Parsippany, New Jersey, in June 2016 pleaded guilty to conspiracy to violating the Anti-Kickback Statute and the Travel Act in connection with payments to physicians for referrals. The president of BLS was sentenced to 72 months in prison, and 54 other people have been convicted.

In the other case, the former CFO of Pacific Hospital in Newport Beach, California, and an orthopedic surgeon pleaded guilty to violating the Travel Act and other charges in a complicated investigation dubbed Operation Spinal Cap. The U.S. Attorney's Office for the Central District of California said the owner of the hospital, Michael D. Drobot, his son and others pleaded guilty to charges involving claims submitted to workers' compensation insurers and the U.S. Department of Labor. In January, Drobot was sentenced to 63 months in prison "for overseeing a 15-year-long health care fraud scheme that involved more than $40 million in illegal kickbacks paid to doctors and other medical professionals in exchange for referring

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thousands of patients who received spinal surgeries," the U.S. attorney's office said. In late June, nine new defendants were charged in Operation Spinal Cap as part of the DOJ's health fraud takedown (see story, p. 1).

Hospital Settled Insurer Lawsuit

Private enforcement actions also are taking a new turn. "One significant development in terms of private enforcement involves commercial payers suing providers," said Dallas attorney Nathan Fish, with Greenberg Traurig, who spoke at the webinar. A series of lawsuits focus on arrangements between labs, marketing/management companies and small community hospitals that tend to be cash-strapped, Fish explained. According to the lawsuits, "networks are set up by labs across the country through sales reps, and allegedly payments are funneled through marketing companies to physicians who refer specimens to the labs," he said. The hospitals allegedly have no relationships with the patients, but the lab tests are billed under the hospitals' name and provider numbers, and they get a piece of the action.

Now the insurers are fighting back with litigation. For example, last year Blue Cross & Blue Shield of Mississippi filed a lawsuit against Sharkey-Issaquena Community Hospital, alleging it had a contract with labs that permitted them to submit claims under the hospital's name and billing number for services not performed by or at the hospital, Fish said. Blue Cross & Blue Shield of Mississippi, which shelled out $9.8 million for these lab claims, sued the hospital for breach of contract and the labs for fraud, civil conspiracy, unjust enrichment and negligent misrepresentation. The case settled out of court for an undisclosed amount, he said.

Two recent lawsuits hit labs, but not the hospitals. "My assumption is the payers are taking this aggressive stance based on the sudden and substantial increase in the volume of billing," Fish says.

Smyer says Medicaid is another fertile ground for quasi-private enforcement. "The trend on the forefront is Medicaid managed care organizations because they are private entities with their own fraud units that do sophisticated analytics."

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