

Health Care Fraud

Health care fraud affects everyone. According to the National Health Care Anti-Fraud Association (NHCAA), \$2.27 trillion was spent on health care and more than four billion health insurance claims were processed in the United States in 2011. Undeniably, some percentage of these claim were fraudulent leading the NHCAA to estimate that the financial losses due to health care fraud are in the tens of billions of dollars each year. This is why the Federal government has increased its enforcement activities against health care providers and instituted laws to assist in that endeavor.

For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA)-specifically established health care fraud as a federal criminal offense, with the basic crime carrying a federal prison term of up to 10 years in addition to significant financial penalties. U.S.C. Title 18 § 1347. This law also provides that should a perpetrator's fraud result in the injury of a patient, the prison term can double. Worse, if a patient dies as a result, the punishment could result in life imprisonment.

Recently, the U. S. Justice Department's largest ever charge of health care fraud was unsealed, revealing a criminal network accused of defrauding the health care system, including Medicare and Medicaid, of over one billion dollars. The investigation produced indicia that the fraudulent activity was the result of organized crime in the health care industry. The Wall Street Journal, which reported the issue on July 22, 2016, credited an interagency Medicare Fraud Strike Force, which operates in nine locations across the country with the bust. Since its creation in March 2007, the task force has charged nearly 2,900 defendants who have collectively billed the Medicare program for more than \$10 billion.

How does organized crime fit into the health care system? What constitutes health care fraud?

The lucrative and somewhat legitimate appearance of the health care industry attracts those with deviant goals. Nefarious intent aside, those practitioners that develop legal issues are not usually the criminal “type.” Sometimes, situations can spiral out of control where they began as relatively simple stressors such as financial delinquency or substance abuse.

Health care fraud turns on the use of deception to achieve a pecuniary goal. Since deception varies, the definition of what actions constitute health care fraud is a moving target. With this in mind, here are a few examples:

- billing for services not actually performed;
- falsifying a patient's diagnosis to justify tests, surgeries or other procedures that aren't medically necessary;
- misrepresenting procedures performed to obtain payment for non-covered services, such as cosmetic surgery;
- upcoding – billing for a more costly service than the one actually performed;
- unbundling – billing each stage of a procedure as if it were a separate procedure;
- accepting kickbacks for patient referrals;
- waiving patient co-pays or deductibles and over-billing the insurance carrier or benefit plan; or
- billing a patient more than the co-pay amount for services that were prepaid or paid in full by the benefit plan under the terms of a managed care contract.

Not all health care fraud is committed by a single entity. Hospitals, providers, doctors, and consumers (as well as groups comprised of each) can be charged with health care fraud. While health care professionals are often the ones reported in the news, consumers have been charged with similar crimes. Some examples of consumer health care fraud are:

- filing claims for services or medications not received;
- forging or altering bills or receipts; or
- using someone else's coverage or insurance card.

There are reasons for the government's concern. Health care fraud diminishes the availability of services to others, depletes Medicare/Medicaid funding, and reduces the availability of lifetime benefits where policy caps are in play. There are even examples of physical injury.

The NHCAA detailed a particular story:

In June 2002, for example, a Chicago cardiologist was sentenced to 12-1/2 years in federal prison and was ordered to pay \$16.5 million in fines and restitution after pleading guilty to performing 750 medically unnecessary heart catheterizations, along with unnecessary angioplasties and other tests as part of a 10-year fraud scheme. Three other physicians and a hospital administrator also pleaded guilty and received prison sentences for their part in the scheme, which resulted in the deaths of at least two patients. The physicians and hospital induced hundreds of homeless persons, substance abusers, and elderly men and women to feign symptoms and be admitted to the hospital for the unnecessary procedures. How? By offering them incentives such as food, cash and cigarettes. "There were 750 people who had needles stuck into their hearts purely for profit, not because they needed it," said one of the federal prosecutors.

This is why the Congress has created the "Coordinated Fraud and Abuse Control Program," to coordinate federal, state and local law enforcement efforts against health care fraud and to include "the coordination and sharing of data" with private health insurers. In 2015, the Federal government won or negotiated almost \$2 billion in judgments and settlements and convicted 653 defendants. *Health Care Fraud and Abuse*

Control Program Annual Report for Fiscal Year 2015. Of the \$29.4 billion returned to the Medicare Trust Fund, \$16.2 was returned between 2009 and 2015, indicating the growing enforcement by law enforcement.

Many states also have responded vigorously since the early 1990s, not only by strengthening their insurance fraud laws and penalties, but also by requiring health insurers to meet certain standards of fraud detection, investigation and referral as a condition of maintaining their insurance or HMO licenses.

Intentional misrepresentation of claims and the necessity for procedures are not the only areas in which health care providers may need legal assistance however. Assisted living centers, independent providers, ambulatory service providers, pharmacies, urgent care facilities, laboratories and independent diagnostic centers all require similar assistance because the laws apply equally to the many facets of the health care spectrum.

For example, the Stark Law, codified at U.S.C. 42 § 1395nn, prohibits the referral of certain services for a Medicare/Medicaid patient if a physician or a family member has a financial interest/relationship with the receiving entity. Enforcement of the self-referral prohibition is becoming more aggressive, even allowing for qui tam (whistleblower) lawsuits. As identified previously, the Department of Justice has identified Stark Law violations as an area of growing concern. Accordingly, much debate in Congress has arisen as a result where, in the last term, two bills seeking to amend the law were introduced. One, sponsored by a Republican, purported to reduce the penalty for simple, technical violations where no inherent malice was present. The other sought to remove the much relied

upon ancillary procedures exemption; the former ideologically opposed from the latter.

Additionally, the Anti-Kickback Statute creates hurdles even for well meaning health care entrepreneurs. A federal statute codified at 42 U.S.C. § 1320a, the law prohibits financial remuneration in exchange for service referrals. The criminal penalties are steep: five years in the penitentiary and a \$25,000 fine per violation! Health care providers and physicians must have adequate representation so that they are informed of the rules and restrictions on self-referrals, kickbacks, and fee splitting. Finally, only with proper legal assistance can you be assured that your certification and payor compliance is properly established so as to avoid the many pitfalls involved with governmental billing and anti-markup rules.

The practice of medicine is stressful enough without the worries imposed by these and other necessary regulations. Perhaps you are just beginning your practice and need some guidance on establishing proper procedures. Maybe you are looking at updating your policies to ensure compliance with state and federal regulations. In these cases, a knowledgeable and professional firm with years of experience in educating clients can guide you to help take the headache out of routine business. Or, you may be in need of tough, reliable, tested trial lawyers. Regardless of your present situation, you can trust the attorneys at Gianola, Barnum, Bechtel & Jecklin, L.C. to fight for the results you deserve.