



Recent Developments in Health Care Fraud Initiatives

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Health Care Fraud

There have been three recent developments in the health care fraud area, one locally and two nationally, that significantly impact enforcement.

On the local level, the attorney general has announced that the Medicare strike force that has focused on health care fraud in south Florida and Los Angeles and will be moving to the Detroit area.

This task force consists of federal agents and Department of Justice prosecutors based in Washington, D.C., who will move their offices to Detroit for an indefinite period of time. Public announcements state that the task force will focus upon infusion for HIV patients, DME and home health.

In discussing this matter with a local official, it is unclear if the task force will focus on just metro Detroit or the entire jurisdiction for the Eastern District Court of Michigan. That includes the I-75 corridor from Monroe to Bay City and the I-94 corridor from Port Huron to Jackson.

On the national level, the United States Supreme Court in May, 2009, issued its opinion in *United States ex rel. Einstein v. City of New York*, which held that when the United States has declined to intervene in a *qui tam*-initiated false claims action, the United States is not a party for purposes of the Federal Rules of Civil Procedure. In other words, the relator cannot avail himself or herself of those rules that apply specifically to the United States government. This unanimous opinion significantly diminishes a relator's attempts to stand in the shoes of the government for procedural issues when the United States has declined to intervene.

Finally, Congress has amended the False Claims Statute as part of a new statute addressing mortgage, securities and commodities, and financial institution fraud. These amendments to the False Claims Statute apply to health care fraud.



While many provisions in proposed legislation which would have eliminated various defenses available to health care providers did not pass, key provisions have passed which have both expanded the scope of the False Claims Statute and have diminished potential defenses.

The False Claims Statute now specifically applies to a provider retaining overpayments. The False Claims Statute applies when monies are not returned even if the overpayment was inadvertent.

In rendering a common defense more difficult, the statute provides that should the government elect to intervene and proceed with an action, the government's complaint shall relate back to the date of the relator's complaint for statute of limitations purposes. To date, federal courts have been very critical of the long passage of time between the filing of a relator's complaint and the government's decision to intervene. Suits have been dismissed related to national initiatives, such as cardiac devices and pneumonia on this basis. The statute of limitations defense, now, will be far more difficult to assert.

Amendments to the retaliatory action for provisions of the False Claims Act may have sweeping impact largely ignored by the commentators to this legislation. Previously, an employee had a separate cause of action should an employer discharge, demote, suspend, threaten, harass, or otherwise discriminate because of the wrongful acts of an employee in furtherance of efforts to stop violations of the False Claims Act. The statute authorized an action in federal district court for retaliation and provided for reinstatement of two times the amount of back pay, litigation costs, and reasonable attorney fees. The statute was amended to expand the employee protections to a "contractor or agent".

In the past, rare attempts on the part of contractors such as physicians whose staff privileges have been diminished to assert retaliation under the False Claims Statute have been dismissed. It now appears that a contractor, such as a physician who contracts with an HMO or who enjoys staff privileges, can assert a separate federal cause of action for sanctions taken against the physician for retaliation for a physician taking steps to prevent violations of the False Claims Statute. Cases have held that retaliation claims are not dependent on a plaintiff's ability to succeed on, or even file, a *qui tam* action. See, for example, *Georgandellis v. Holzer Clinic, Inc.*, (SD Ohio, dec'd June 5, 2009).

The retaliation provisions in these amendments far exceed any opportunity a physician would have under state whistleblower statutes or staff privilege litigation. There will now be an incentive on the part of sanctioned physicians to assert False Claims Act violations.