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Medicare kickback case unsettles attorneys

Lawyers acquitted of conspiracy charges, but experts worry it's become too easy to subvert privilege

Recent developments in a Kansas City hospital kickback case are sending chills through many health care attorneys, who wonder if they'll become the next target of federal investigators eager to sidestep the attorney-client privilege.

In the case, two administrators at Baptist Medical Center in Kansas City and two doctors were convicted of participating in a 10-year-long kickback and bribery scheme. According to prosecutors, the physicians received more than $2 million in thinly disguised "consulting fees" in exchange for referring Medicare and Medicaid patients to five local hospitals, including Baptist.

What's interesting about the case, however, is the fact that two health care attorneys who represented Baptist were also indicted. Attorneys Ruth Lehr and Mark R. Thompson were charged with being part of the conspiracy when they resisted subpoenas to testify in the case, claiming attorney-client privilege. The government attempted to short-circuit the claim of privilege by arguing the lawyers were part of the conspiracy. Based on a limited showing, U.S. District Judge John Lungstrum ordered the lawyers to testify.

Although the judge threw out the indictment against the attorneys after the government had concluded its case, several legal observers who watched this case closely say no transactional lawyer should be breathing too easy.

Health care attorney **Tom Crane** of Mintz Levin in Boston considers the government's aggressive move to indict the attorneys "very troubling." He

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GAO report triggers all-out assault on nursing homes

Stinging criticism from the Government Accounting Office over how HCFA oversees the country's 17,000 nursing homes has re-ignited a bidding war between Congress and the White House over who can inflict tougher sanctions on the industry.

Days before the Senate Special Committee on Aging was set to hear the GAO's latest criticisms last month, HCFA Administrator Nancy-Ann Min DeParle unleashed a barrage of new measures designed to ratchet up enforcement of federal and

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FCA decisions may lead to Supreme Court showdown

Two recent appellate decisions sharply limit the ability of the federal government to bring qui tam suits under the False Claims Act (FCA) and cast serious doubt on the legitimacy of the federal government's aggressive FCA enforcement efforts under the PATH (Physicians at Teaching Hospitals) initiative.

John Boese, an attorney who specializes in FCA cases, says these rulings will have a major impact on health care organizations that receive federal funding by severely restricting FCA cases against states and state entities.

The two decisions are at odds with three other recent circuit court decisions, and several legal observers believe that makes a showdown in the Supreme Court inevitable. "I don't how the Supreme Court can turn this one down because they have such a clear conflict in the circuits," says Boese, of Fried, Frank, Harris, Shriver & Jacobson in Washington, DC.

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Attorney-client privilege

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says the court's decision that the crime fraud exception applied demonstrates the minimal showing a U.S. attorney needs to destroy the attorney/client privilege. He also predicted that the guilty verdicts against the executives will likely rejuvenate the government's interest in taking cases under the anti-kickback statute.

"This is the first case that I am aware of in the health care industry where a lawyer has been indicted along with his client under the anti-kickback statute," says Houston-based criminal defense attorney **Lee Hamel**. But whether it signals a new trend in Department of Justice prosecutions is yet to be seen, he adds.

Even so, the possibility of a crackdown on health care lawyers has many attorneys on edge. "The jury is still out over how much of a chilling effect this case will have on the role of in-house counsel advising health care institutions," says **Henry Fernandez**, managing director of KPMG's Litigation and Forensic Services in Atlanta.

In any event, the Kansas City trial shouldn't be considered merely an aberration, Hamel says. "Hospitals, physicians and lawyers can all expect that when similar circumstances exist, they will all be looked at very carefully." He points to the savings and loan crises of the 1980s when a number of lawyers were prosecuted for their role in advising financial institutions.

"There are many cases where someone is likely to claim the defense of advice of counsel where the prosecution's theory is to haul them before the grand jury," Hamel explains. "What they try to do is undercut the advice defense." According to Hamel, the bottomline is that both the Department of Justice and HCFA will continue to scrutinize the role of health care attorneys in drafting agreements in which a patient referral relationship exists. ■

COs must oversee physician contracts

So how can hospitals and other health care institutions avoid the anti-kickback charges faced by Kansas City's Baptist Medical Center? "The lesson to be learned from the hospital's point of view is that any consulting agreement with physicians who refer patients has to be looked at very, very carefully," says Houston-based criminal defense attorney **Lee Hamel**.

Step one, he says, is for hospitals to hire competent counsel and get that advice in writing. Step two is to have a committee at the hospital provide oversight to make sure the services outlined in the contract are actually being performed. "That is an absolute necessity," he says.

Hamel adds that compliance officers should have some oversight over these contracts. "You must make sure all consulting services called for under the contract are actually being provided so that the government can't call it a sham," he cautions.

Tom Crane of the law firm Mintz Levin in Boston, MA, takes a similar view: "Failure to document likely had an important bearing on the outcome of the [Kansas City] case." But he also cautioned that this case still has a long way to go. "I would be stunned if it wasn't appealed," he said. ■

FCA decisions

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Rick Robinson, an attorney with Fulbright & Jaworski in Washington, DC, agrees: "I think we'll see that happen because you have a split over something which involves core issues of federalism." Robinson says the two appellate decisions are extremely important because they insulate states from the threat of triple damages and civil monetary penalties under FCA. "Nobody is saying

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FCA decisions

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states don't have to return overpayments," he adds. "The argument is that it's not appropriate for the feds to try to punish state governments."

Boese says the decisions in the 5th Circuit and DC Circuit represent the first time state defendants have won at the appellate level by arguing that states are not "persons" under the meaning of the FCA and that the Eleventh Amendment precludes suits by whistle-blowers against state entities.

The 5th Circuit case involved a former resident at Texas Tech University who alleged that the university submitted claims to Medicare and Medicaid falsely certifying that staff physicians had supervised services performed by residents. The plaintiff also filed a claim under the FCA saying she suffered retaliation for her whistle-blowing activities.

The district court concluded the university could be sued even though the government had elected not to intervene. But on March 29, 1999, the 5th Circuit reversed that decision, holding that the Eleventh Amendment bars *qui tam* suits against state entities when the government declines to intervene.

Three days later, the DC Circuit ruled on the same basic issue. In that case, a former employee in the audit branch of the New York State Department of Education alleged that the State of New York had conspired to conceal fraudulent claims to the federal government. This time, the DC Circuit ruled that states are not "persons" subject to suit under the FCA. "While the court didn't address this issue explicitly, the clear implication of its ruling is that even the Federal Government may not sue states under the FCA," says Boese.

Ivy Baer, an attorney for the American Association of Medical Colleges in Washington, DC, agrees that the split among the circuit courts makes a Supreme Court ruling likely.

"We are hoping that we get a good decision that is widely applicable for our state institutions," says Baer. "If the Supreme Court decides not to take this then we are left with four separate Circuit Court decisions, which really doesn't tell us much of anything." ■

Home oxygen providers say HCFA standards overdue

Home oxygen providers believe they have little to fear from the Government Accounting Offices (GAO's) recent findings that development of service standards for home oxygen suppliers should be a priority of the HCFA.

"It is about time that HCFA got around to issuing standards for home oxygen equipment suppliers," says **Erin Bush**, associate director of government relations for the Health Industry Distributors Association in Alexandria, VA. "We have been working toward more realistic standards ever since we held a consensus conference on this issue in 1996."

As the GAO pointed out, the Balanced Budget Act of 1997, which slashed Medicare rates for home oxygen by a stiff 30%, also required the establishment of service standards for Medicare's home oxygen benefit. But that requirement was never fulfilled.

What's behind the delay? HCFA watchers say the agency's resources have been sapped by other priorities, notably Y2K computer modifications. "This has just not been a priority even though Congress and GAO have repeatedly asked them to do it," says Bush. "They are caught up with Y2K computer updates, which are all-consuming."

In response to the report, HCFA told the GAO it plans to publish new service standards that will apply to all durable medical equipment providers in the next few months followed by specific service standards for home oxygen.

But even if this comes about, it might have only a marginal impact on the industry, says health care attorney **Michael DeCarlo** of Dickstein, Shapiro, Morin & Oshinsky in Washington, DC. "Service standards might be a 'red herring' as far as what is really needed in the industry," argues Decarlo, a veteran of many durable medical equipment wars. DeCarlo points to significant changes in home oxygen technology that are changing the way the industry functions. "The industry is already making fewer visits and manufacturer's recommendations are stretching those visits out as well," he says. ■

Nursing homes

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state nursing home standards. Senate Special Committee on Aging Chairman Charles Grassley (R-IA) described HCFA's pre-emptive strike as a replay of last summer when the Administration sought to headoff bad news about a GAO investigation in California with a similar package of initiatives.

"What is going on here is that the President and the Congress have both tasked HCFA with fixing enforcement problems," said Scott Parkin, spokesman for the American Association for Services and Homes for the Aging, in Washington, DC, "and the HCFA Administrator is on the hot seat right now."

Health Care attorney **Marie Insante** of the Washington, DC, firm Pyles Powers Sutter & Verville is not sanguine about what these accelerating agendas mean for the industry. "What you have is a lot of enforcement mentality driving policy in the wrong direction," Insante asserted. "The government is sitting on this like a 1,000 pound gorilla and the system is going to collapse under its own weight."

HCFA deputy administrator **Michael Hash** was set to appear before Grassley's committee along with the GAO March 22 but pulled out when HCFA learned the first panel would include private citizens recounting nursing home horror stories.

"You might note that HCFA is no longer on the witness list for today's hearing," Grassley declared at the hearing. "I hope this is not an indication of an arrogant attitude toward citizen input."

Hash's statement, submitted in absentia, proved that HCFA is ready to up the ante. While generally accepting the GAO's recommendations, Hash outlined a series of measures already under way to address these problems.

Hash reported that HCFA has directed all state survey agencies to investigate all complaints alleging harm to a resident within 10 working days and all claims alleging immediate jeopardy within two days.

He also pointed to HCFA's regulation published March 18 that lets the agency impose Civil Monetary Penalties up to $10,000 for each serious violation it finds.

Hash also asked Congress for an additional $60 million next year to implement HCFA's new initiatives. According to Hash, HCFA wants $50 million to beef up state inspection and enforcement efforts and another $10 million in order to double the number of Administrative Law Judges and speed the sanctions process.

For its part, the GAO charged that HCFA's "limited guidance" over nursing homes has created "a yo-yo pattern" in which homes cycle in and out of compliance. The agency cited serious deficiencies in more than a quarter of the country's roughly 17,000 nursing homes.

The GAO asserted that while CMPs have "a potentially strong deterrent effect," their effectiveness has been limited by a growing backlog of appeals. There are currently more than 700 cases awaiting decision, said the GAO. Worse yet, only 37 of the 115 monetary penalties imposed on the 74 homes examined by the GAO have been collected and many of those were settled at reduced fines.

According to the GAO, HCFA's other major anti-fraud tools — denial of payments for new admissions and termination — have also been enforced weakly. The agency reported that HCFA rescinded 55% of payment denials and 72% of terminations before they ever took effect.

Just days after the GAO report was released, Deputy Inspector General George Grob poured fuel on the fire when he told Grassley's committee that an investigation of nursing homes in the country's 10 largest states revealed an increase in 13 of 25 quality of care deficiencies including lack of supervision and improper care for pressure sores.

To remedy these problems, Grob suggested a broad agenda that focused largely on improvements in the survey and certification process. He said the existing survey process is too predictable and plagued by ineffective enforcement. As evidence, he noted that 47% of all substantiated complaints receive no action.

An aide to Grassley confirms that he is not likely to cede the field to HCFA. Senate Aging spokeswoman **Jill Gerber** reports that Grassley has met frequently with the GAO and plans to keep the spotlight on nursing homes. ■