

Hospitals Cannot Form Intent to Violate the Law

Executives Might Pay More Attention to What They are Doing if They Knew They Could Be Held Liable

It is clear when you follow enforcement actions in the health care industry by the Department of Health and Human Services (HHS) Office of Inspector General (OIG) and Department of Justice (DOJ) that the number one enforcement priority relates to business relationships between referral sources and hospitals or other entities. What is particularly interesting is that the predicate for “*qui tam*” actions under the civil False Claims Act (under Title 31 Section 3729-30) are more likely than not to be violations of the anti-kickback statute.

Most people know the *qui tam* provision as the “Whistleblower Act,” in that a whistleblower (relator) may share in the penalties exacted from a successful case. The *qui tam* provision is attached exclusively to the civil False Claims Act, which is not a criminal violation. The government’s position, however, is that the existence of a “corrupt” arrangement between hospital and referral sources pollutes all the business arising from it. As such, all claims are considered false and fraudulent, regardless of whether the patient needed the care and the services rendered were appropriate.

The theory of the prosecutors can be devastating to a hospital or other party with such agreements. The violation of the anti-kickback statute is a crime, and the punishment carries a mandatory exclusion along with other penalties. Most entities confronted with this will settle monetarily under the civil false claims provisions rather than the more draconian alternative.

Under the civil False Claims Act, the government has the burden to prove that the violator “knowingly presents, or causes to be presented...to the United States Government...a false or fraudulent claim for payment or approval.” This does not mean that there is an intention-



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al violation of law. Even under the criminal fraud statutes, the “specific intent” standard does not need to be established.

By contrast, the anti-kickback statute, section 1128B(b) of the Act, is a criminal statute that prohibits the knowing and willful offer, solicitation, payment, or receipt of remuneration to induce or reward the referral of any business payable by a federal health care program. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a federal health care program, the anti-kickback statute is violated.

For purposes of the anti-kickback statute, remuneration includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. The statute has been interpreted to cover any arrangement in which *one* purpose of the remuneration is to induce or reward referrals. Parties that violate the statute may be subject to criminal, civil, or administrative penalties. The OIG enforces the anti-kickback statute in partnership with the DOJ.

In most fraud cases, the government can make claims against a hospital, and it settles on an amount without any individual being named as a perpetrator. If proved, however, a corrupt arrangement of kickbacks would be a specific intent crime that requires identification of the individual wrongdoer(s).

In a criminal anti-kickback case, there are criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration in order to induce or reward the referral of business reimbursable under any of the federal health care programs. The offense is classified as a felony and is punishable by fines and imprisonment. There is an administrative alternative to the Act, but it also requires establishing an element of intent.

Many “whistleblowers” are filing *qui tam* actions with the civil division of the DOJ, alleging a corrupt arrangement between a hospital and physicians that implicates the civil False Claims Act. As such, when charges are filed by the government, individuals are named as the prime movers in the corrupt arrangement. Remember, only people, not buildings, can form intent to commit a specific intent crime.

Check it out by looking at any *qui tam* complaint filed under the False Claims Act. Chances are you will find allegations of kickbacks with named individuals and not just the entity. Think how much more powerful the government’s case is when it names the wrongdoers. I believe more top executives involved in physician arrangements would pay closer attention to what they are doing if they realized they may be held personally accountable for illegal kickbacks under criminal provisions of the law.

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