Top Health Care Fraud Legal Challenges for SIUs

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Topics

- Discuss the overall health care fraud environment
- Identify challenges for SIUs and issues for consideration by law enforcement
- My goal is to prompt discussion and provoke strategic thinking – for both private sector and law enforcement.
- Discuss (briefly) a few hot topics as well
- A legal perspective on the overall fight against health care fraud

Key Themes

- Warning – Your biggest single challenge is making sure that private sector investigations remain relevant.
- Your second biggest challenge – Continuing to justify your existence in meaningful ways
- For law enforcement, you need to remember that health care fraud is not just a government program problem, and that you should be looking for ways to assist with private sector fraud (and to benefit from private sector information)

Key Messages

- Private sector SIUs face substantial challenges in the years ahead
- Private sector SIUs need to respond aggressively to this evolving environment
- The need for cooperation among plans has never been higher
- SIUs need to find a new way to make themselves valuable to their companies and to the government investigators.

The Big Picture – Setting the Stage

- The health care industry is in a state of ongoing turmoil – made increasingly complicated and uncertain by the dramatic changes arising from health care reform.
- The reform pressures in health care are also occurring at a time where there are broader economic challenges across the country, affecting both state and federal governments (as well as the private sector).
- There is no indication that these cost pressures are going away any time soon.

Health Care Reform

- Change always brings confusion
- Change always brings new fraud opportunities
- Historically, the fraudsters are better at managing change than the government or insurers
- Prosecutors and investigators are on high alert and change often makes them very creative

Health Care Fraud Today

- The government increasingly is interested in (1) preventing fraud; (2) punishing those who perpetrate fraud and (3) recovering the proceeds of fraud (with additional penalties).
- An increased focus on "pre-pay" results
- More emphasis on budgetary impact

Overall Attitude towards Anti-Fraud Activities

- General recognition that money spent on anti-fraud efforts will result in overall savings
- Anti-fraud programs have become a significant element in the health care reform debate – as a means of "cutting costs," with the expectation of "making money" on these investments.

The Government's Anti-Fraud Effort

- More money being thrown at health care fraud through numerous channels
- Continuing evolution of the use of anti—fraud contractors (Do we think this will work?)
- New tools that can be used by the government to detect, investigate and prosecute
- Closing of various loopholes

Health Care Reform

- There are a variety of provisions that generally are designed to put the new Federal health care programs and the related programs being established by this legislation on the same footing for anti-fraud purposes as other Federal programs (e.g., by ensuring that the False Claims Act will apply to these new programs).
- Can expect significant new government anti-fraud efforts.
- Expect many more data-driven cases – substantial new opportunities to gather and analyze data

Health Care Reform

- BUT - There is very little (essentially nothing) in the health care reform legislation that deals directly with the private sector's role in the fight against health care fraud or that otherwise addresses fraud in connection with private health insurance programs.
- While there is additional funding for government health care anti-fraud activities, and, in some circumstances, some of this money could be used in support of private sector cases, in general these provisions are directed at fraud involving government health care programs.

Implications

- New tools create substantial opportunities for aggressive anti-fraud activity by law enforcement and government regulators
- The government is expecting that these tools will be used to protect government health care programs and reduce government health care expenditures

Implications

- This means that we can expect an uptick in health care fraud activity AND that this activity will be increasingly focused on government programs
- What does this mean for both public and private anti-fraud activities?
- What does it say about the goal of these activities?

(Rhetorical?) Issues to Consider

- Does the government care about private sector fraud?
- How can the private sector "help" the government care about private sector fraud?
- Are there aspects of the government's efforts that are more (or less) likely to help private insurers?
- Is there an increasing disconnect in cases?

Cases for consideration

- Criminal cases under the HEAT initiative
- Abbott Labs - $1.5 billion set aside for off-label marketing
- Amgen - $780 million charge for kickback investigation
- Relevance of these cases to the private sector?

Implications

- Remember – health plans that participate in government programs are also potential targets of the government's investigations and have deep pockets.
- There are real risks here
- Is there a role for the SIU on the "defensive" side?

Implications

- You face a challenge with your company and your customers about measuring anti-fraud activities
- The government faces the same challenge
- Is there room for common ground? What's the goal?
- You need a strategy for defining your role that covers savings, denials, recoveries and the full package of anti-fraud success

The Need for Information Sharing

- Premise – You need to make your investigations better.
- SIUs should be trying to make themselves helpful to law enforcement, so that law enforcement will provide some help back
- If this isn't working, private sector SIUs need to do a better job collectively as a group
- Are companies willing/prepared to do that?

Basic Principles for Information Sharing

- A brief refresher
- Fraud fighting receives substantial legal protections - immunity statutes and privileges
- Strong public policy supporting participation in fraud investigations
- No risk-free investigations, but reasonable, very modest risks

State Immunity Statutes

- The Pennsylvania insurance immunity statute provides that no civil liability can arise for furnishing information to other insurers or law enforcement officials related to suspected fraudulent insurance acts "[i]n the absence of fraud or bad faith." 40 P.S. § 474.1

Important Components

- "No civil liability"
- "For furnishing information to other insurers or law enforcement officials"
- "related to suspected fraudulent insurance acts"
- "in the absence of fraud or bad faith"

Key Issues

- Who Can you Talk to About What?
- Standard for Losing Protection?
- New Hampshire - Attorney's fees
- Arkansas - Plead with Specificity
- What does this really get you?

Privileges

- Insurer can avoid liability by showing that the communications and disclosures were privileged.
- Protection arises when an insurer communicates information in order to protect
    1. its own interests
    2. the interest of third persons
    3. an interest the insurer and a third person share
    4. or the public interest

Abuse Of The Privilege

The privilege may be abused by:

- publication of the defamatory material with "malice" (usually meaning that the person had reason to believe that the information was false);
- publication for a purpose other than that for which it is privileged (for example, reporting to the police because you want to negotiate a better PPO deal with a provider, rather than prosecute fraud);
- "excessive" publication (such as disclosure to the police and a newspaper); or
- publication of material not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (gossiping about a provider's personal life in addition to reporting suspected fraud).

Conclusions

- A gut check issue – No way to avoid all risk
- These protections are not necessary to "authorize" communications
- Protection is very strong, but not absolute
- Will you take advantage of these opportunities to improve your investigations?

An additional challenge

- There is an increasing set of courtroom challenges to SIU/anti-fraud practices
- Many (most? all?) of these suits will either go away or be resolved favorably.
- How much will the possibility of these suits affect your anti-fraud activity (either information sharing or other actions)?

New Initiatives

- Predictive modeling – significant time, effort and money being put into developing appropriate technology to identify fraud
- Data mining clearly helps – issue is whether is helps in real time, prospectively, or only retrospectively

New Initiatives

- "The heart of our shift [from "pay and chase" to a prevention-based system] involves keeping the bad actors out and educating providers on billing mistakes." Peter Budetti, CMS
- Will this be enough?
- How much of the fraud problem is "bad actors" and "billing mistakes?"

The overall approach

- The easy steps to “front end” efforts
- More emphasis on compliance programs
- More emphasis on provider education
- Additional emphasis on entry into the Medicare program
- More aggressive and speedy criminal activities (shutting down fraud quickly)

The overall approach

- The hard step - real time, front end claims review
- Historical precedent is very complicated – lots of political pressures and concern about how these efforts affect the core of the Medicare program
- And – its really hard

Questions

- Where does the private sector fit in on these issues?
- Where can the private sector piggyback?
- Which of these will help (or hurt) the private sector?
- What lessons can be learned?

Predictions

- Continued aggressive efforts on fighting health care fraud – and to recover/obtain money
- Continued confusion, inefficiency and experimentation surrounding the government's anti-fraud contractors.
- Ongoing confusion about what the issues are that affect health insurers
- Risks for plans as targets because prosecutors often do not understand how payors work

Hot Topics: Medical Loss Ratio

- A different effect on anti-fraud activities
- Clearly creates some significant issues
- MLR does not apply to self-funded or government programs – will you be acting any differently?

Medical Loss Ratio Issues

- Identifying the issue – <u>This is an open area and this is not legal advice on this point</u>
- Fraud recoveries are included as incurred claims "not to exceed the amount of fraud reduction expenses."
- Fraud prevention activities are not activities that improve health care quality
- What exactly is the message here?

Hot Topics: Compliance Programs

- The government is placing an increased emphasis on “front end” prevention techniques (as opposed to pay and chase)
- Leading to new efforts to mandate compliance programs for all participants in the health care industry
- This is important both as an anti-fraud tool and as a defensive tool for insurers
- Requires an ongoing and active effort to maintain compliance operations

Compliance Conclusions

- How can this help on the anti-fraud side?
- Defensive focus - Because prosecutors and investigators may not understand your business or the new rules – and their opinion of you may not be favorable – many of their investigative reactions will be driven by instinct
- Try to build effective relationships
- Be responsive and proactive, and be prepared to educate on the rules and your business

Hot Topics: Insider access

- There is a clear problem in the health care industry of insiders mis-using their access to information
- The "problems" range from relatively innocent situations to true criminal behavior – but this is a big issue for companies
- This concern is tied into ongoing HIPAA concerns about unauthorized access (e.g., employees looking into claims records of celebrities or politicians) – an enormous risk/exposure for health plans (mainly through customer service and claims staff)

Insider access

- You need to have a way of dealing with this problem
- Should involve a mix of training, sanctions and audits/monitoring
- This is a high risk area because problems are actually happening and law enforcement and regulators know they are happening
- Need to coordinate compliance, investigations and privacy
- Need to have an approach to this issue – and it will come up

Hot Topics - Part D

- Increasing concern that anti-fraud efforts are not sufficient in the Part D program
- We keep waiting for the other shoe to drop
- Part D creates the biggest tensions for health insurers between their anti-fraud activities and their compliance activities
- CMS will be moving to a more aggressive audit role

Part D

- This is an excellent time to review your overall Part D anti-fraud and compliance plan
- You likely will face targeted questions if you have not reported any potential fraud
- Make sure you are keeping pace with where others are having problems.

Hot Topics: Medical Identity Theft

- Increasing problem, with substantial new attention from regulators
- Your company needs to have a plan for addressing these issues
- For some companies this is falling through the cracks – not a clear responsibility
- Need to make the connections between privacy, compliance and fraud

Medical Identity Theft

- SIUs need to make sure they are involved in this effort
- At some plans, this is driven by Privacy Office without SIU involvement
- This is a big issue that is not getting enough attention today

Hot Topics: A HIPAA Wild Card

- If an individual requests that a covered entity restrict the disclosure of the PHI of the individual, the covered entity must comply with the requested restriction if--
- (1) except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment); and
- (2) the PHI pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

Self-Pay Issues

- Is this a big deal?
- What is the goal here?
- This provision contains no compliance obligations for health insurers
- Will this actually be an issue?
- Rules will be effective sometime in mid-2012

Hot Topics: Electronic Medical Records

- The HHS OIG is placing a priority on evaluating fraud issues with electronic medical records
- The HITECH incentives are pushing more and more providers to these records
- You need to be thinking about how to attack fraud in this area

Hot Topics: Computer System Transitions

- Significant developments in electronic claims
- ICD-10 transition
- HIPAA 5010 standards
- Do you understand what these mean?
- Do you have a plan in place?
- What are the new issues? (and what old issues will change)?

Hot Topics: Prosecution of Individuals

- Government is re-emphasizing the importance of pursuing remedies against individuals/executives involved in corporate fraud
- Will this make a difference?
- Will the effort be successful?
- Is there relevance to the private sector?

Hot Topics: Prosecution of Individuals

- How does this effort relate to enforcement challenges involving companies?
- Some concern – and growing – that government has too much power in cases (or that risks are unfair to companies)
- A series of examples where company has paid enormous sums and individuals have been acquitted

Conclusions – Private Sector

- A lot of areas where SIUs need to be focusing attention
- Real possibility that government anti-fraud focus will turn even more to public programs
- Private sector needs to be aggressive and creative to maintain and expand its role in health care fraud investigations
- You need to figure out a way to remain relevant to law enforcement

Conclusions – Private Sector

- Health insurers also need to be aware of the "defensive" side of government investigations
- Government investigators and prosecutors are seeing a wider range of allegations against health insurers and are exploring creative and innovative cases
- Make sure your SIU is cooperating with your compliance office and General Counsel on these activities
- Be aware of the MLR rules – and prepared to respond

Conclusions – Public Sector

- Private sector investigators have lots of useful information
- They can support your cases and make them stronger
- Health care costs matter just as much on the private sector side
- The anti-fraud effort will be most effective when it is a true partnership.

Overall Conclusions

- We are entering an era of even more change than usual
- The dollars spent on health care continue to grow
- This is a bad combination – those who want to commit fraud are very good at what they do

Overall Conclusions

- We will need an ongoing, committed and focused effort
- Public and private entities can work together – the more the better
- With all the change, better sharing of information and knowledge will help everyone