



The Prosecution of Healthcare Fraud In the New Millennium

By Douglas M. Nadjari, Esq.



The Government contends that of the \$1.3 trillion spent on health care during the year 2000, over \$100 billion has been lost to fraudulent health insurance claims. Thus, even in the wake of the terrorist attacks of September 11, 2001, the United States Department of Justice continues to make the investigation and prosecution of health care fraud a "top priority".ⁱ While the authorities traditionally targeted home health

care agencies, prescriptions for durable medical equipment and clinical laboratories services, federal prosecutors have now widened their dragnet to address widespread allegations of collusion between the pharmaceutical industry and physicians to both bilk Medicare for improper reimbursement and falsely inflate the price of certain medications.ⁱⁱ Not to be outdone by their federal counterparts, recent events show that some local prosecutors have redoubled their efforts to prosecute health care providers suspected of engaging in other fraudulent activities.

For example, the federal government brought criminal charges against Astra-Zeneca and five urologists for conspiring to falsely inflate the average wholesale price of Zoladex, a cancer medication. In late June 2003, Astra-Zeneca pleaded guilty and agreed to pay \$875 million to settle civil and criminal claims arising from these relationships. Hundreds of physicians were implicated in the Government investigation which continues. In a similar indictment brought by the Government against TAP Pharmaceuticals, it is alleged that TAP provided physicians with free samples of a medication called Lupron (for which Medicare was billed), provided unrestricted grants, office equipment and tickets to sporting or cultural events in exchange for the use or purchase of its medication. Several urologists were convicted of conspiring with TAP and the corporation paid nearly one billion dollars in fines and penalties.ⁱⁱⁱ Other investigations into the reported payments of kickbacks to physicians by pharmaceutical

manufacturers in exchange for the agreement to prescribe particular medications including Lupron and Prilosec are ongoing.^{iv}

Prosecutors are using new investigative tools and questionable theories of jurisdiction to further their initiatives. For example, unbeknownst to most physicians and lawyers alike, both The Health Insurance Portability and Privacy Act ("HIPAA") and the "Patriot Act" have provided federal prosecutors with new weapons, which are now being employed in the fight against fraud. HIPAA, which purports to be a privacy law, actually empowers federal prosecutors to evade the secrecy that attaches to grand jury proceedings by permitting federal prosecutors to issue "administrative subpoenas" to obtain otherwise confidential records and, as they see fit, share those records with state and local law enforcement agencies that would otherwise be prohibited from obtaining the same private information.^v

Recently, the United States Attorney in the Eastern District of New York issued an administrative HIPAA subpoena for the production of a physician's office records. While the prosecutor claimed that the subpoena was issued to investigate health care fraud, he later admitted that the administrative subpoena was issued so that the Government could share these otherwise confidential records with local prosecutors who were investigating matters totally unrelated to health care.

The questionable zeal with which the Justice Department now attacks health care practitioners was revealed by remarks recently made by Attorney General John Ashcroft. Despite the law's obvious intent, Ashcroft admitted to permitting federal prosecutors to use a provision of the Patriot Act, enacted soon after the September 11 attacks, to employ the use of "roving" wiretaps to eavesdrop not only upon terrorists and major drug dealers, but those suspected of engaging in health care crimes as well!

Formerly, prosecutors were required to make a sworn showing of need before obtaining a court order to

employ electronic eavesdropping technology upon any single telephone line. The law required separate sworn applications and court orders covering every phone the Government wanted to tap. Now, federal prosecutors can obtain a “roving” wiretap permitting its investigators to eavesdrop upon nearly any telephonic conversation of a particular health care fraud suspect without obtaining separate court orders. Thus, conversations over various telephones may now be intercepted without having to justify the attendant invasion of privacy to a judge, as the law previously required.^{vi}

In the months that followed Attorney General Ashcroft’s pronouncement, local prosecutors began to “push the envelope” even further, albeit in other directions. For example, last summer Suffolk County District Attorney Thomas J. Spota indicted over five-hundred physicians, management companies, chiropractors, acupuncturists and patients who allegedly conspired to stage phony automobile collisions and exploit New York’s byzantine No-Fault insurance law by allegedly billing for unnecessary treatment rendered to participants in these “collisions” thus defrauding the automobile insurance companies. Despite the fact that the prosecutions were brought in Suffolk County, the evidence demonstrated that many of the collisions occurred in the City of New York and that the treatment in question was rendered there as well.

Thus, one may wonder why these cases were not brought by the City’s District Attorneys. Speculation has it that the City’s D.A.’s, faced with ever increasing budget constraints, pulled their dwindling resources from such “white-collar” criminal investigations and instead, channeled them back to their primary function: the

prosecution of crimes of violence. It appears that Mr. Spota may have attempted to “pick up the slack” left by the City’s District Attorneys by providing insurance companies with a sympathetic forum. Despite the fact that the cases were premised upon a questionable theory of jurisdiction, indictments were obtained and the District Attorney enjoyed widespread media coverage of a prosecution that was touted to be the largest of its kind in the nation’s history.

Law firms representing indicted physicians undertook successful challenges to the questionable exercise of jurisdiction by the District Attorney in Suffolk County. Indeed, when faced with the dual challenges of motions attacking the jurisdictional underpinnings of these indictments and a Freedom of Information Act seeking disclosure of financial details of the relationship between the District Attorney’s office and the insurance industry, Mr. Spota agreed to the dismissal of many of these heralded prosecutions. Having regrettably chosen to sit on the sidelines as Suffolk basked in the media’s sunshine, the City’s District Attorneys and The New York State Attorney General have entered the No-Fault “fray” once again as witnessed by a flurry of indictments in Manhattan, Brooklyn and Queens.

While the outcome of legal challenges to the use of HIPAA subpoenas remains to be seen, one may be sure that the relationships amongst physicians, patients, management companies, purveyors of durable medical equipment, the pharmaceutical and insurance industries will become the subject of increasing scrutiny by local, state and federal prosecutors in the months and years to come.

Douglas M. Nadjari, is a partner in the law firm of Ruskin Moscou Faltischek, P.C. where he represents healthcare providers in disciplinary proceedings, criminal and civil litigation matters, before hospital committee and in managed care disputes. Prior to joining his firm, Mr. Nadjari was a partner in a major medical malpractice defense firm and, in the Brooklyn District Attorneys Office he the private sector, he served successively as Supervisor and Deputy Chief of the Homicide, Investigations, Felony Trial and Major Frauds Bureaus. He has substantial experience trying complex civil and criminal cases to successful conclusion. He may be contacted at (516) 663-6536 or dnadjari@rmfpc.com.

ⁱ United States Attorneys’ Manual 9-44.100 – 204; United States Department of Justice, *Annual Performance Report, 2002, Section 2.4A.*

ⁱⁱ United States Department of Justice Criminal Resource Manual, Section 976;; United States Department of Justice, *Annual Performance Report, 2002, Section 2.4A.*

ⁱⁱⁱ United States Department of Justice, *Annual Performance Report, 2002, Section 2.4A.*

^{iv} The New York Times, June 21, 2003, C4.

^v 18 U.S.C. 3486

^{vi} 18 U.S.C. 2518

