

HEALTH CARE FRAUD

Home Health Care Compliance: On *Maxim* and the Senate Finance Committee



BY JEREMY D. FREY AND THOMAS M. GALLAGHER

The 2011 surge in health care fraud prosecutions by the Department of Justice is likely to continue for the foreseeable future, with home health care fraud cases leading the way. Recently, there have been some dramatic events affecting home health care businesses.

Jeremy D. Frey (freyj@pepperlaw.com) is a partner with Pepper Hamilton LLP in Philadelphia and Princeton, N.J. His practice focuses on white collar criminal defense and civil litigation. He is a former federal prosecutor and a member of the advisory boards of BNA's White Collar Crime Report and Criminal Law Reporter.

Thomas M. Gallagher (gallaght@pepperlaw.com) is a partner at Pepper Hamilton in Philadelphia. He is chair of the firm's White Collar and Corporate Investigations Practice Group and is a former federal prosecutor. His national practice is primarily focused in the health care industry.

In September, DOJ announced its cases involving Maxim Healthcare Services. In October, a Senate Finance Committee report seemingly accused home health care giants Amedisys, Gentiva Health Services and LHC Group of “gaming” Medicare to maximize reimbursements.¹ In light of these developments, home health care businesses should be proactively assessing the risks of qui tam relators, whistleblowers, and grand jury investigations involving their operations.

Background

In the highly fragmented U.S. health care industry, the home health care segment focuses on health care goods and services required by those residing in the home—as compared with those in medical facilities, such as hospitals and long-term care facilities.

Home health care primarily consists of nursing and certain assisted living services such as therapy, as well as the home medical device market—notably including respiratory machines, infusion therapy devices, and all manner of durable medical equipment. By far, Medicare pays the largest share of the national costs of home

¹ 6 WCR 841 (10/7/11).

health care, because it most often involves the elderly, followed by Medicaid.

The *Maxim* Case

Maxim was reportedly born of a qui tam relator, a Maxim employee, who filed a sealed lawsuit in New Jersey federal court against Maxim for overbilling Medicaid. Maxim is a national home health care provider, headquartered in Columbia, Md., that focuses on Medicaid-eligible clients. The ensuing multiyear investigation by the New Jersey U.S. Attorney's Office resulted in the termination or resignation of virtually all of Maxim's management and senior staff, including its general counsel.

Maxim also has to pay criminal and civil penalties of approximately \$150 million.² To date, the government scored guilty pleas from nine Maxim managers and others on felony charges relating to the business. Maxim is now operating under a two-year deferred prosecution agreement, and it has a monitor. The experience has presumably left Maxim in a diminished condition.

To the extent that *Maxim* involved double billing and up-charging of Medicaid, including false timesheets, the story is unremarkable and the company's chastisement is understandable. The *Maxim* case gets interesting, however, in the government's pursuit of claims for services that were rendered.

Apparently, the cases of some patients were managed by Maxim offices that were not properly licensed under state regulatory provisions. The charges against Maxim referred to this regulatory noncompliance in alleging that there were "billings through licensed offices for care actually supervised by unlicensed offices." Some of the state regulatory office licensing provisions, which are highly technical and roughly drafted, carry no criminal penalties for their breach. These technical violations of the government's limited regulatory interests—like the location of patient files—provide little additional justification for the bludgeoning that Maxim received.

In short, *Maxim* means that home health care companies should not just be assuring themselves that their billing patterns are normative. Their compliance officers should likely be scoring technical regulatory non-compliance as having much greater risk to their enterprises than might at first seem reasonable.

Management and compliance officers must also take note of the government's concern in *Maxim* about the company's culture, which for the government overemphasized sales (as compared with quality of care) and provided incentive compensation that did not sufficiently "promote patient care and compliance."³ In an unusual moment, the government's DPA commends

² 6 WCR 776 (9/23/11).

³ Prosecutors have long regarded certain forms of incentive compensation as an emblem of fraud. Frey, J., "Bonuses and Incentive Compensation as Emblems of Fraud: DOJ's Latest 'Teaching Moment?'" Pepper Hamilton LLP (August 4, 2009),

Maxim for establishing and filling the position of "chief culture officer."

Regardless of whether purveying corporate cultural values is a proper job for federal prosecutors (and there are persuasive reasons why it is not), for-profit home health care businesses need to be wary of presenting themselves to employees and shareholders alike as dedicated to corporate growth and the bottom line. In the health care area, compensation of employees tied to sales and revenue is a compliance risk. Selling shoes or steel is very different from providing health care goods and services that are to be reimbursed by government programs.

Amedisys, Gentiva Health Services, And LHC Group

The most recent example of missing this message can be found in the Senate Finance Committee report regarding giants Amedisys, Gentiva, and LHC Group. Internal e-mails from company executives reportedly provided evidence that staff was encouraged to make home therapy visits to achieve levels warranting employee bonus payments, perhaps without regard to medical necessity.

The committee report concludes that "therapy practices [at the three companies] at best represent abuses of the Medicare home health program" and "may be examples of for-profit companies defrauding Medicare." Following the report, the companies' shares plummeted on fears of prosecution. There is little chance that DOJ will not be queried by Congress in the future as to whether Amedisys, Gentiva or LHC Group⁴ have been investigated and prosecuted, and if not, why not. The committee's ultimate recommendation that "CMS must move toward taking therapy out of the payment model" is an unfortunate by-product of these events.

Conclusion

For executives and compliance officers in home health care, these examples provide familiar refrains. Proactively changing business practices to address emerging paradigms of corporate conduct is a necessity and not a luxury. The task before management and compliance officers is to identify and execute these changes in their companies through example, training, discipline, investigation, and re-imagined structures.

available at http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1563.

⁴ On Sept. 30, LHC Group announced a \$65 million settlement with the government that apparently arose out of a qui tam case. As provided in the company's press release, the dispute related to whether some patient medical records contained sufficient documentation for the period of 2006 to 2008. There were no findings that the company billed for services not rendered. The company also agreed to enter into a corporate integrity agreement with the government.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, e-mail and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

For now, the hardest part for management is probably still the least travelled. Shareholder and investor expectations of health care businesses, which so drive

corporate decisionmaking, require modification and revision to be in line with the times. DOJ needs to help with that one.