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Enforcement

Provider Bankruptcies Increase Physicians' Fraud Liability Risks (Updated)

BNA Snapshot

- Bankrupt lab's fee payments to physicians facing scrutiny from bankruptcy trustee, OIG
- Trustee lawsuits against over 1,000 physicians provide OIG with enforcement road map

By Eric Topor

Physicians sued by the trustee for a bankrupt laboratory testing service, which in 2015 settled fraud claims with the DOJ for $47 million, are facing another threat: kickback claims.

On one front, these physicians are facing over 1,000 lawsuits, filed by the trustee for Health Diagnostic Laboratory (HDL) to recover processing and handling fees of $10 and $17 paid to physicians who referred patients to the lab for various tests before its demise. Meanwhile, the Department of Health and Human Services Office of Inspector General has some of these same physicians in its sights.

The trustee for HDL, which filed for Chapter 7 bankruptcy in 2015, has characterized those fees as illegal kickbacks that qualify as fraudulent transfers under the Bankruptcy Code and has sued to get them back. If the trustee is right, the physicians who referred patients to HDL could be investigated by the OIG and potentially subject to civil monetary penalties (CMPs) based on the same processing and handling fee payments.

Health-care and bankruptcy attorneys told Bloomberg BNA that the HDL bankruptcy trustee filings could provide government investigators with a road map for pursuing civil or criminal enforcement actions against over 1000 physicians being pursued by the HDL bankruptcy trustee, Richard Arrowsmith. Future provider bankruptcies outside the laboratory services arena could give rise to similar litigation and enforcement initiatives, they added.

'Scary' Challenge for Physicians, Groups

William P. Conaboy, with Buchanan Ingersoll & Rooney PC in Philadelphia, said the filings "create a scary enforcement challenge for the physicians who worked with these labs in good faith and for similarly situated providers that may in the future be blind-sided by this two-headed compliance conundrum." The challenge is further complicated, he added, by the reality that commercial payers may look to assert fraudulent billing claims related to payments not within the HHS OIG's purview.

David S. Schumacher, a partner at Hooper, Lundy & Bookman PC in Boston, agreed, saying the filings are "a real wake up call" for providers to be cautious in their arrangements. "The collateral consequences of these types of lab fee arrangements can be extreme," Schumacher said, and the potential enforcement liability might not "be limited to a DOJ action, as excruciating as that can be," but could include the OIG and bankruptcy lawyers.

The potential liability for physicians sued by HDL's bankruptcy trustee could be significant, ranging from a few thousand dollars to almost $1.2 million in one case. But the threat associated with an investigation by the OIG, which has the power to impose CMPs of up to $74,792 per kickback violation (for 2017) and can exclude physicians from participating in federal health-care programs, can be even greater.

Not the First … or Last

The Department of Justice followed a similar path in the lab kickback scheme perpetrated by Biodiagnostic Laboratory Services LLC (BLS), which made over $100 million from Medicare and other private health insurers through lab billings facilitated by physician kickbacks. Prosecutors have secured over 41 criminal convictions and guilty pleas related to the BLS scheme since 2013, including at least 27 physicians who received kickback payments from BLS.

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> *David S. Schumacher, Hooper, Lundy & Bookman PC, Boston*

With fraud enforcement against culpable individuals remaining a priority at the Department of Justice, it is also not hard to envision a repeat of either the HDL or BLS enforcement scenarios in the future, with a big lab or other provider that has many health-care provider relationships getting caught in a kickback scheme that could expose physicians to similar enforcement liability.

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Bankruptcy Filing 'Fishbowl'

Jeremy Johnson, a partner in Polsinelli PC's New York office with particular expertise in health-care bankruptcies, told Bloomberg BNA that fraudulent conduct is one of the top causes of health-care bankruptcies. Johnson said it is common for the OIG to investigate a bankrupt health-care provider that has fraud or anti-kickback issues, but that liability typically doesn't extend beyond the bankrupt entity itself.

The HDL bankruptcy is different though, Schumacher said, because the OIG is going after the same providers targeted by the bankruptcy trustee.

The litigation and investigation of so many providers that had financial arrangements with HDL is "a wrinkle that's very unique to this particular case," Johnson said. One reason why the OIG is able to pursue investigations and possibly CMPs against physicians who received processing and handling lab fees from HDL might be Arrowsmith's numerous bankruptcy filings.

"One of the big consequences of filing for bankruptcy is that you're operating in a fishbowl," Johnson said. "All of your past books and records are opened up," Johnson explained, which enables OIG investigators "an area that they can go to for discovery that they wouldn't normally have."

Choosing a Response

Physicians who receive a demand letter from Arrowsmith's counsel for the return of processing and handling fees to HDL's bankruptcy estate not only have to determine how to respond in the bankruptcy realm but also determine what action, if any, is needed in terms of compliance with the anti-kickback law.

Johnson said that claims like the ones being filed by Arrowsmith "can almost always be settled," but he said it is important to have counsel examine the claims made in the demand letter or bankruptcy complaint and look for a provider's legal defenses and include those in any response or counter settlement offer. Johnson said some bankruptcy trustees simply issue demand letters to every person or entity who received a payment from the debtor for the full payment amount. Providers receiving a demand letter can save "a lot of money" by analyzing their defenses to keep those payments, Johnson said.

Arrowsmith has characterized the processing and handling payments received by physicians as improper kickbacks, which raises the issue of anti-kickback liability from the OIG, or even the DOJ, for violation of the anti-kickback law. The stakes for dealing with OIG and DOJ investigations into the processing and handling fees can be much higher than in the bankruptcy context. Arrowsmith is generally just seeking a return of the fees themselves to the estate, but the OIG and DOJ can impose program exclusions and criminal prosecutions, in addition to significant monetary fines per violation.

But the government faces a high hurdle as well, said Schumacher, who was also the former deputy chief of the Health Care Fraud Unit for the U.S. Attorney's Office for the District of Massachusetts. "It's always more difficult to prove that a doctor engaged in a kickback than it is to prove the same conduct by a device manufacturer, a pharmaceutical company, a lab, or

whatever entity paid the kickback," Schumacher said. That is because a physician will always say that they used a particular service or company because they provided better quality services, not because of any payment received.

Schumacher said determining whether the processing and handling fees were illegal kickbacks will involve multiple questions that might require litigation to answer. Among those, whether the physicians chose to use HDL because of the fee payments, whether those payments were above market rate and, if so, whether the physicians were aware of that and chose HDL on that basis.

"It's going to be challenging for the OIG to go after thousands of physicians who have had tens of thousands of interactions with this lab" and prove that the physicians were receiving kickbacks, Schumacher said. He echoed Johnson's view that showing an intent to induce referrals is easier "on the bankrupt provider side, where you have access to internal emails, where they interviewed people, and where they probably generated substantial evidence."

The resolution of the bankruptcy claims by settlement wouldn't have any impact on any enforcement action pursued by the OIG, Johnson said. A settlement with the trustee wouldn't include any admission of guilt or receipt of kickbacks, Johnson said. But if the trustee's claims were pursued through litigation to judgment, then "that would definitely have some impact" with the OIG, Johnson said.

Schumacher agreed that a judgment in bankruptcy court concerning whether the fees paid to a particular physician were kickbacks would impact an OIG investigation. Schumacher said litigating the bankruptcy claim "creates even more exposure and risk for a physician," if the physician receives an unfavorable judgment. On the other hand, a judgment that the fees weren't kickbacks might dissuade the OIG from pursuing the matter further.

Self-Disclosure Considerations

A provider on the receiving end of a letter from a bankruptcy trustee demanding the return of alleged kickback payments may feel that it is prudent, or necessary, to self-disclose those payments to the OIG through the agency's self-disclosure protocol. The self-disclosure protocol allows providers to voluntarily alert the OIG to potential fraud violations in exchange for a measure of leniency in penalties.

Schumacher said self-disclosure is an option in cases like this, but said "any defendant is going to be nervous, about self-disclosing, based on how aggressive the government has been with respect to health-care fraud and kickbacks over the years." That is the case, Schumacher said, because there is a "perception" that self-disclosing will allow the OIG to penalize a provider without obtaining much benefit from having offered up potentially incriminating information.

Conaboy agreed that the self-disclosure decision for providers caught between trustees and the HHS OIG is complicated but that, for those physicians and physician groups that received a relatively small amount from federal health-care programs, self-disclosure would seem to be appropriate.

(Story updated with additional comments throughout.)

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