Trends in Combating Fraud and Abuse in Substance Use Disorder Treatment

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The addiction treatment industry—everything from residential rehabilitation programs, outpatient facilities, drug and alcohol counseling, and sober living housing—has boomed over the past decade. Not only has the incidence of substance use disorders (SUDs) increased dramatically with the opioid epidemic, but major changes in the industry itself have transformed SUD treatment into an industry with spending at an estimated $34 billion a year and growing.[1] Indeed, official estimates forecast SUD treatment spending to grow to more than $42 billion in 2020,[2] and this figure does not include the additional private spending on sober living and recovery housing.

For years, addiction treatment was a cash-pay business focused largely on wealthier families who could afford the "luxury" of SUD treatment. Most health insurance policies offered limited, if any, coverage for SUDs, so that prospective patients had to pay out-of-pocket for their treatment. The Mental Health Parity and Addiction Equity Act in 2008 began to change that. The federal legislation required most group health plans and insurance providers to cover mental health (including SUD treatment) just as they would other medical care. A few years later, the Patient Protection and Affordable Care Act (ACA) took the next step in solidifying coverage for mental health and SUD treatment by making it one of the "essential benefits" that most plans were required to offer. The ACA also allowed young adults to stay on their parents' health plans until age 26, thereby covering a larger portion of the population most likely to seek SUD treatment. These legislative changes had the effect of flooding the addiction treatment industry with more patients and more money. The increased demand for SUD treatment caused by the opioid epidemic and other societal factors, coupled with the opened spigot of insurance dollars, created an industry boom, as addiction treatment businesses and operators raced to meet the growing demand.

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As both private and government health insurers have seen reimbursements to SUD providers grow exponentially, they have unsurprisingly responded in kind, for example by creating "special investigation units" to investigate potential fraud and abuse, and otherwise "cracking down" on what they perceive to be unnecessary, excessive, or downright fraudulent practices on the part of SUD providers. Unfortunately, insurer investigations have uncovered more than incidental fraud and abuse within the burgeoning treatment industry—what some have come to call the SUD "gold rush." Newspapers report dramatic stories about outrageous bills for simple urine tests, and fraudulent practices that bilk public and private insurance out of millions of dollars. A recent case in Florida, for example, captured national headlines when a treatment center and sober living owner and his associates were accused of egregious misconduct involving prostitution, human trafficking, drug distribution, millions of dollars in phony insurance claims, and patient deaths.

Both federal and state governments have been devoting additional resources to combat these abuses. The Department of Justice (DOJ) created its own taskforce, an Opioid Fraud and Abuse Detection Unit, targeting opioid-related health care fraud. As explained below, the federal government is using some of the laws traditionally aimed at health care fraud generally to focus in on this industry in particular. States are also enacting their own laws to regulate this growing field. Compliance professionals should be aware of these important trends in the addiction treatment industry.

Traditional Laws to Combat Health Care Fraud and Abuse

Fraud and abuse in SUD treatment are subject to the same laws that combat general health care fraud and abuse, especially given that approximately 70 percent of spending on SUD treatment comes from public sources.[3] Below is a brief overview of the key laws that may be applied to misconduct by SUD operators, marketers, and other professionals when government and, in some cases, private insurance is being billed.

Federal Criminal Penalties for Kickbacks and False Claims

One of the most common types of illegal activity in SUD treatment involves kickbacks. Common schemes involve operators paying marketers for the referral of patients or giving prospective patients gifts, free airfare, housing, or insurance premiums to sign them up as patients and bill their insurance. Outpatient clinics may enter into illegal kickback arrangements with sober living houses and pay for "bed vouchers"—paying the sober living to house a patient for whom insurance is being billed. Operators also may receive kickbacks from outside laboratories for referring patients for urinalysis or other tests.

The federal anti-kickback statute, 42 U.S.C. Section 1320a-7b *et seq.*, is a powerful tool against this type of abuse. Subsection (b) provides criminal penalties for illegal remuneration and makes it a crime to knowingly and willfully solicit, receive, or pay any remuneration (including any kickback, bribe, or rebate) in exchange for referring a patient with federal health insurance. The punishments include felony criminal liability, imprisonment up to five years, and fines up to $25,000. Meanwhile, Subsection (a) creates criminal penalties for false claims, which involve false statements in any application for benefits or payments to federal health care programs, among other misconduct. The punishments for false claims include misdemeanor criminal liability and fines up to $10,000. Furthermore, as discussed below, false claims create civil liability through federal and state false claims acts.

In addition, health care fraud also may be subject to 18 U.S.C. Section 1347, which makes it a crime "(1) to defraud any health

care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program." Punishment for violations of this statute includes fines and imprisonment. Jail time depends on the severity of the case: (i) standard cases may involve up to 10 years of imprisonment; (ii) if the violation results in bodily harm, up to 20 years of imprisonment; and (iii) if violation results in death, up to life in prison.

In addition, states may have their own versions of these federal laws that apply to misconduct involving state-sponsored insurance plans.

Civil Penalties for False Claims and Fraud

In addition to criminal liability, SUD operators accused of fraud and abuse may be subject to civil liability through federal and state laws. The well-known federal False Claims Act, 31 U.S.C. Section 3729 et seq., creates civil liability for a range of misconduct related to making false claims for payment or approval to the federal government. Operators may face civil penalties between $5,000 and $10,000 per claim, treble damages, and costs of bringing the civil action. Many states have their own version of the federal False Claims Act, creating *qui tam* procedures and civil liability for false claims submitted to state government agencies. For example, California Government Code Section 12650 et seq. mirrors the federal law and creates liability for misconduct related to making false claims to the state government. Potential penalties can range from $5,500 to $11,000 per false claim, plus treble damages, and the costs of bringing the civil action.

States are finding other ways to combat fraud and abuse through the civil legal system. For example, in addition to its own false claims act applicable to government billings, California has a law that authorizes *qui tam* actions on behalf of the state for fraud against private insurance companies. The California Insurance Fraud Prevention Act, California Insurance Code Section 1871.7(e)(1) et seq., authorizes *qui tam* actions where there are allegations that an individual defrauded a private insurance company by, for example, (1) providing kickbacks and/or using runners, cappers, steerers, or other individuals to procure patients; (2) making a false or fraudulent claim for payment of a health care benefit; and (3) making false statements for the purpose of obtaining or denying workers' compensation. Like a false claim proceeding, operators found guilty of misconduct may face civil penalties between $5,000 and $10,000 for each fraudulent claim, treble damages, and equitable relief.

In addition, operators found liable of misconduct can face other types of penalties. Notably, state licensing agencies, which grant facilities, programs, and professionals licenses or credentials to operate in the state, may seek suspension or termination, or other enforcement actions if there are credible allegations of fraud or abuse. Operators may be out of business before a guilty verdict is ever delivered. Operators also may be excluded from participation in federal and state health care programs, and thus unable to bill public insurance for patient services, which may effectively force them to close shop.

Recent Prosecutions Under Federal Law

Pursuant to the federal criminal laws outlined above, the DOJ has been going after bad actors in the SUD industry. Recent prosecutions have targeted fraudulent billings under the health care fraud statute, kickbacks, and patient brokering covered by the federal anti-kickback statute, and violations of other federal criminal laws.

Health Care Fraud

Last year, the DOJ announced a "National Health Care Fraud Takedown" whereby the

Medicare Fraud Strike Force led a takedown resulting in 412 defendants being charged in 41 federal districts for health care fraud schemes resulting in $1.3 billion in false billings. Of those charged, over 120 defendants, including doctors, were charged for their roles in prescribing and distributing opioids and other dangerous narcotics. Allegations included billing for treatments that were medically unnecessary or never provided and paying kickbacks and submitting bills to federal health care programs.[4]

One egregious case that has received nationwide press involved Kenneth Chatman, an addiction treatment facility and sober living home operator accused of a host of misconduct, and his associates that helped Chatman engage in a multimillion dollar fraudulent sheme.[5] Chatman ran intensive outpatient treatment centers and sober living houses in south Florida, often called the "Rehab Riviera" and known for its over-abundance of SUD-related facilities. Chatman's businesses, however, did not provide legitimate treatment or recovery housing but instead, as the government accused, were run as flophouses and brothels. Chatman purportedly allowed residents to openly use illegal drugs and alcohol so long as he could keep billing their insurance for phony urine tests, unnecessary saliva tests, or bogus outpatient treatment services.

Chatman was accused of using doctors to rubber-stamp expensive and unnecessary drug, DNA, and allergy tests, for which he would bill insurance or receive kickbacks from outside laboratories. Former residents also claimed that Chatman withheld their car keys, medications, food stamps, and other belongings in order to control them and kept some of the women addicted to drugs so that he could use them as prostitutes. After a patient overdosed and died in one of his facilities and another patient accused the operators of keeping her as a sex slave, the government arrested Chatman and began investigating his facilities.

Last year, Chatman pled guilty to conspiracy to commit health care fraud, in addition to money laundering and sex trafficking charges. Among the allegations related to health care fraud were charging insurance companies for phony treatments and tests, billing for services tainted by kickbacks and bribes, and using fraudulent applications for licensure to hide the fact that he was prohibited from owning and operating treatment centers due to a previous felony conviction. The government even accused Chatman of providing drugs to recovering addicts when their insurance was about to run out so that they would have a positive drug test and be eligible for another round of treatment services. Chatman was sentenced to 27 years in prison. Other defendants have also been indicted and sentenced in connection with his scheme.

More investigations, indictments, and sentencings are likely to arise from health care fraud in the SUD industry related to billing government insurance programs for medically unnecessary tests, upcoded charges, services not rendered, and other phony charges.

Kickbacks and Patient Brokering

In addition to general health care fraud based on fraudulent billings, the government has recently been pursuing cases that involve kickbacks, bribes, and patient brokering in the SUD industry. The Kenneth Chatman case also included guilty pleas for violations of the federal anti-kickback statute, including offering bribes in the form of free or reduced rents and other benefits to prospective residents.[6] Chatman and his associates also offered kickbacks and bribes to other sober homeowners to induce them to refer their residents to his outpatient treatment centers. He attempted to disguise those payments as "case management fees," "consulting fees," "marketing fees," and "commissions" but, in reality, they were just payments for patient brokering and other kickbacks. In addition

to Chatman's 27-year sentence, other co-conspirators, including the co-operators of the complicit sober living homes, the medical directors and the clinical director of his treatment centers, and his wife, all have received jail time for their roles in the health care fraud, including their knowledge of or participation in the illegal kickback arrangements.

More recently, the DOJ obtained guilty pleas in connection with a case where two treatment center owners engaged in a range of health care fraud, including illegal kickbacks. The operators of Angel's Recovery, a licensed substance abuse service provider and medication-based treatment provider for opioid addiction, established illegal kickback/bribe relationships with sober living home operators and provided kickbacks (including free rent at sober living and payments for their insurance premiums) to prospective patients with insurance. They also committed other health care–related crimes, including using an unlicensed medical doctor as the facility's medical director and submitting false insurance claims. In May 2018, one defendant received a sentence of 78 months in prison for conspiracy to commit health care fraud, while his co-defendant received 30 months in prison for making false claims related to a health care matter.[7]

Unlawfully Dispensing Controlled Substances

Another type of federal criminal prosecution being brought in the addiction and SUD treatment industries relates to prescriptions of controlled substances, including opioids *and* opiate substitution medications (such as Methadone). The DOJ's Opioid Fraud and Abuse Detection Unit has begun implementing sophisticated and highly technical methods to employ "big data" to target and prosecute individuals that commit opioid-related health care fraud and has been effective thus far in ferreting out misconduct.

Recent enforcement actions have shown that the government is targeting the use of opiate substitution medications, in addition to the opioids themselves. Medication-assisted treatment for opioid addiction is subject to strict regulation at both the federal and state levels. Operators of opiate addiction treatment facilities that do not obey applicable rules and regulations could face criminal charges, in addition to having their licenses to operate or to prescribe drugs revoked. As a recent example, the owner of an addiction treatment center that used buprenorphine (Suboxone and Subutex) for opiate substantiation treatment was indicted in June for unlawfully dispensing a controlled substance. The indictment alleges that the owner of Redirections Treatment Advocates paid doctors for blank, pre-signed prescriptions, which she would then fill out with a patient's name and order for narcotic drugs.[8] The DOJ also alleged that the facility's owners and physicians engaged in health care fraud related to unlawful prescriptions billed to Medicare and Medicaid.[9]

In addition, with the scrutiny on so-called pill mills and physicians unnecessarily prescribing opioids, there are likely to be more and more prosecutions related to unlawfully dispensing controlled substances to addicts. For example, a physician was recently sentenced to 96 months in prison and ordered to pay restitution and forfeit his medical license for his unlawful distribution and dispensing of controlled substances. Dr. Charles Fred Gott pled guilty to knowingly distributing drugs, including methadone, fentanyl, and other opiates, without a legitimate medical purpose. He also admitted to billing various health care programs, including Medicare and Medicaid, for medically unnecessary tests and upcoding.[10] The investigation of the former doctor began after the coroner's office noticed that Gott was the prescribing physician in several overdose deaths.[11]

These prosecutions are examples of a broader trend of heightened scrutiny over medical professionals for their role in providing opioids, even in supposed detoxification and SUD rehabilitation settings.

Recent State Legislation

States are pursuing additional ways to target fraud and abuse in health care, and specifically SUD treatment, in addition to the federal criminal and civil laws covered above. In particular, there has been a recent trend to go after misconduct in SUD treatment through targeted legislation. Many states are creating laws that address specific types of misconduct rampant in the SUD industry.

Patient Brokering Laws

Some states have been developing legislation to combat kickbacks and other forms of illegal referral arrangements, known as patient brokering. Patient brokering typically refers to the illegal practice by sober living home operators of "selling" a patient to an outpatient treatment program, or otherwise referring the patient to a certain provider, in exchange for money or other remuneration.

For example, Utah House Bill 14, which became effective May 8, 2018, classifies the illegal remuneration for the referral of an individual for SUD treatment to be a Class A misdemeanor. Obviously, not all referral arrangements are illegal. The new law recognizes that there are types of permissible discounts, fee waivers, and payments to providers for consultation and other services. The law also creates an exception for an "information service" that provides information to prospective clients, so long as the service meets certain criteria such as charging set, fair market value fees not based on the potential value of the billings and not steering clients to particular programs or providers.

Other states have similar patient-brokering laws under consideration. New York Assembly Bill 7689 would make patient brokering a criminal misdemeanor. No provider could intentionally solicit or accept any payment, benefit, or other consideration in any form for a referral of a potential patient for SUD services. Exceptions would include: (1) lawful payments by health maintenance organizations or health insurers; (2) marketers who identify themselves as marketers and merely educate the potential patient about the program without making any efforts to steer or lead the potential patient to select the SUD services provider for whom the marketer works; and (3) commissions or other lawful remuneration paid to insurance agents.

Deceptive Marketing Practices

State lawmakers are also going after deceptive marketing practices in SUD treatment. Operators and marketers have been accused of spreading false information about their programs, from basic facts about facilities' locations to patients' success rates and using deceptive marketing practices online and by telephone. For example, a program may market itself as being "beachside" when the facility is miles from the ocean, or Web sites may direct users who search for "rehab near me" to sites for out-of-state facilities. In addition, marketers at toll-free call centers may not reveal that they are being paid by a particular treatment facility to send all referrals to that program, regardless of the patient's needs or location.

To combat such abuses, Tennessee House Bill 2068, effective July 1, 2018, prohibits misleading marketing practices for Alcohol and Drug Treatment Facilities, including: (1) making false or misleading statements about the operators' goods, services, or geographical locations; (2) including false information or links on its Web site; (3) soliciting or receiving kickbacks, bribes, or split fee relationships in exchange for referrals; or (4) using call centers or Web-based presences to generate leads unless certain disclosures are

made. The law creates civil penalties and licensure suspensions for violations.

Meanwhile, Illinois House Bill 4949, which is awaiting signature from the governor, would amend the state Consumer Fraud and Deceptive Business Practices Act to target certain forms of misleading advertising for SUD treatment. The proposed law would require certain disclosures for advertising and promotional materials directed to Illinois residents considering mental health or SUD treatment, including whether the program is licensed, the services are covered by insurance, the provider is in or out-of-network, and the fact that treatment may be available at a reduced cost or free for residents.

Sober Living Home Licensure

Another trend at the state level is laws aimed at regulating sober living and recovery houses. As the Kenneth Chatman case demonstrated, some sober living homes are being operated purely for profit, with little being done to help residents maintain sobriety. Facilities like his have been accused of being flophouses and drug dens that many legitimate operators believe are giving the industry a bad name. Stakeholders in the sober living industry hope that regulation and oversight will eliminate these bad actors and protect the vulnerable population needing these facilities on their paths to recovery.

To this end, many states have been instituting voluntary licensure and/or certification programs, whereby a state agency or designated affiliate has oversight responsibility for sober living facilities in the state. In states where there are voluntary licensure programs on the books, licensure and/or certification may be required to receive referrals from government funded facilities or to receive government funding but is not legally required to operate. Such programs are currently in operation in Florida, Maryland, Massachusetts, Missouri, Pennsylvania, and Rhode Island.

Pennsylvania was the most recent state to pass a voluntary licensure program. Pursuant to legislation passed on December 12, 2017, sober living homes will need to be certified to receive referrals from state agencies or state-funded facilities or that receive state and federal funding. In Pennsylvania, the same agency that licenses substance abuse treatment centers, the Department of Drug and Alcohol Programs (DDAP), will be responsible for overseeing sober living residences. However, like many states with voluntary licensure and/or certification programs, it appears that DDAP will be using another agency to handle the certifications on its behalf. Many states use the local affiliate of the National Association of Recovery Residences to handle the certification process, from applications to inspections.

Meanwhile, other states are pursuing even more stringent regulation of sober living houses. A few states have created mandatory licensure schemes, whereby a license is *required* to operate any sober living facility in the state, although there may be some exceptions for certain types of self-run sober houses. Utah, New Jersey, and Arizona all have some sort of mandatory licensure requirement on the books.

Arizona recently created its mandatory licensing program for sober living houses. Pursuant to legislation passed on April 11, 2018, sober living homes will have to be licensed or certified to operate in the state; residences that violate the new law would face civil penalties for each day they operate without required credentials. Effective January 1, 2019, only certified and/or licensed sober living homes will be able to receive client referrals from licensed treatment programs in the state, treatment programs funded by state or federal funds, state agencies, or state-contracted vendors. In addition, only certified and/or licensed sober living homes will be able to receive federal or state funding to provide sober living services.

It is likely that some of these licensure programs will be challenged in court. There has been some litigation under the Fair Housing Act and Americans with Disabilities Act, which both guarantee certain housing-related protections to individuals with SUD. Whether the new crop of laws can withstand legal challenges under these federal laws and their state counterparts remains to be seen.

Conclusion

With the explosion of SUD treatment fueled by insurance reforms and the opioid crisis, there has been a marked intensification of scrutiny over the treatment, billing, marketing, and other practices of treatment centers and sober living homes. And, regrettably, in many instances, that heightened scrutiny has indeed revealed fraud and abuse. The federal government has responded with dedicated taskforces focused on criminal misconduct, resulting in an uptick in criminal prosecutions of operators, owners, and other professionals in addiction treatment and recovery housing. In addition, state governments have begun more heavily regulating these related industries through targeted legislation focusing on SUD treatment providers and sober living operators. As explained above, many recently proposed laws regarding patient brokering and misleading marketing practices single out the addiction treatment industry specifically.

States and other local governments are also pursuing other ways to protect consumers and to regulate the industry. As with the statewide efforts to create licensure for sober living homes, many local municipalities are pursuing their own licensing requirements, often through zoning and land use ordinances that require licensure or registration for a sober living facility to operate, or through local regulations authorizing localities to avoid "overconcentration" of SUD treatment facilities and sober living homes, often through proximity restrictions and similar tools, in the name of protecting the "residential character" of neighborhoods and communities.

States and local governments are also using nonlegislative means to protect prospective patients. For example, in April 2017, the Massachusetts Attorney General's office issued a Consumer Advisory about "Scams That Refer People to Out-of-State Addiction Treatment Facilities Offering Little or No Treatment to Patients," educating consumers to be wary of certain practices, including kickbacks like free travel or payments of insurance coverage.[12] Outreach and education to individuals seeking treatment or recovery housing may be a powerful way to curb fraud and abuse, in addition to the use of criminal penalties and new civil laws.

The battle lines among SUD treatment providers, insurance companies and government payers, and local communities are still being defined. Until those lines have become sufficiently well-worn, compliance professionals would be wise to invest substantial time and effort in staying abreast of these and other developments in the treatment industry. Falling behind now can lead to painful, if not catastrophic, problems down the road.

Endnotes

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