



# Medicaid Fraud Enforcement

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## Primer on Medicaid Fraud Control Units

Born out of Congressional hearings held in the 1970s.

MFCU model created off success of New York.

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## Dual Missions of a MFCU

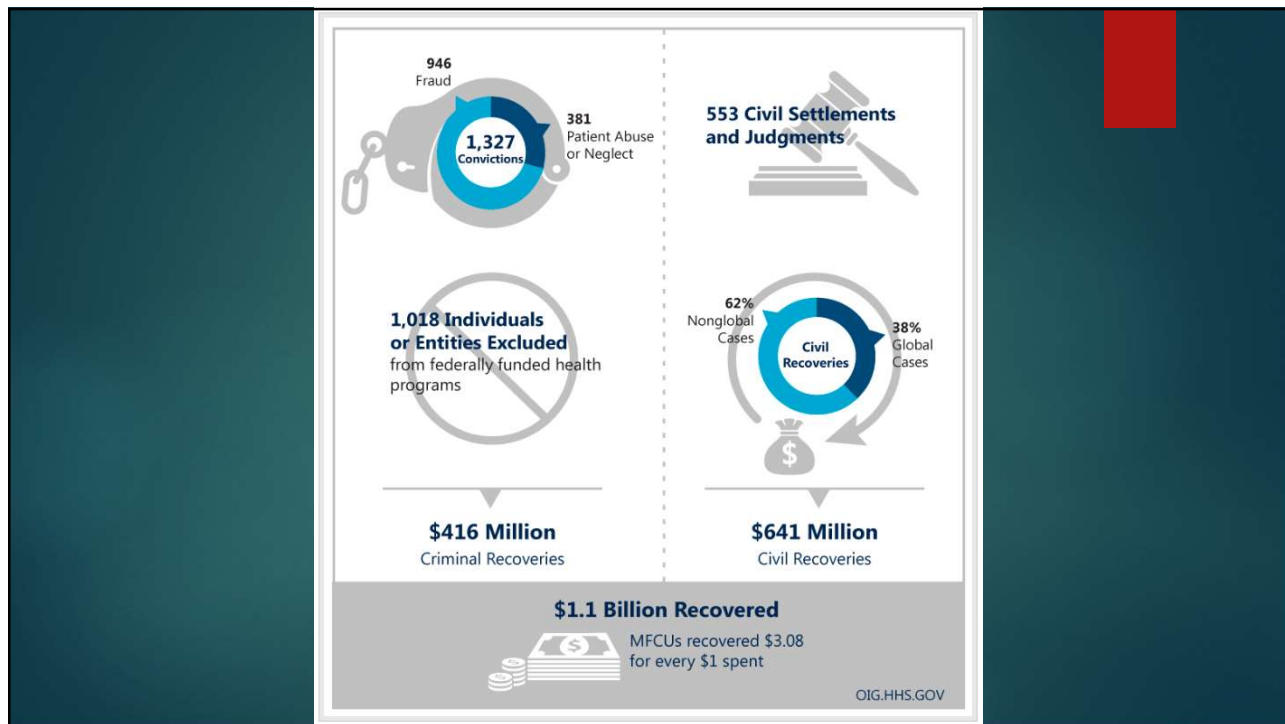
- ▶ Investigate and Prosecute Medicaid Provider Fraud
- ▶ Investigate and Prosecute Abuse/Neglect of Residents in any “board and care” facility.
- ▶ MFCUs do NOT engage in beneficiary or recipient fraud cases\*.

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MFCUs are  
(almost)  
Everywhere

- ▶ Exist in all 50 states.
- ▶ Plus District of Columbia, Puerto Rico, and Virgin Islands.
- ▶ Vast majority are a Division within the State Attorney General’s Office.

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## How Does a MFCU get Cases?

- ▶ Hotline/Web Complaints from the Public.
- ▶ Referrals from the State Medicaid Agency/OIG.
- ▶ Referrals from outside agencies, i.e. local police, licensing authorities, etc.
- ▶ Data mining.

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## A Word about Data Mining

- ▶ General prohibition on MFCU data mining.
- ▶ Data mining requires a waiver from HHS-OIG.
- ▶ 23 states currently have a waiver.

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## How Does a MFCU Make Intake Decisions?

- ▶ Prior history of violations/complaints involving provider?
- ▶ Is there a component of patient harm?
- ▶ High dollar amount?
- ▶ Was there an attempt to hide the conduct?
- ▶ Other aggravating factors?

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## Emerging Trends and Interests

- ▶ The staples still exist, i.e. personal care services, transportation, etc.
- ▶ Drug Diversion.
- ▶ Hospice Fraud.
- ▶ Substance Use Disorder Treatment.
- ▶ Pharmacy Benefit Managers.
- ▶ Private Equity.

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### Attorney General's Office charges five with \$9.5M in Medicaid fraud

*Alleges owners and management of MN Professional PCA agency billed for services not performed, services not supervised by qualified professional*

*Largest Medicaid fraud prosecution charged by Attorney General's Office*

**August 29, 2023 (SAINT PAUL)** — Minnesota Attorney General Keith Ellison announced today that his office has charged five people as part of a scheme to defraud the Minnesota Medical Assistance (Medicaid) program out of approximately \$9.5 million. To date, this is the largest Medicaid fraud prosecution charged by the Minnesota Medicaid Fraud Control Unit (MFCU) of the Attorney General's Office.

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## TWENTY DEFENDANTS ARRESTED FOR \$5 MILLION MEDICAID TRANSPORTATION FRAUD SCHEME

**Release Date** Oct 11, 2023

**Contact** Kylie Mason

**Phone** (850) 245-0150



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SEPTEMBER 14, 2023 | MIDDLE TENNESSEE, NEWS

## Nurse Indicted, Charged in TBI Drug Theft Case


**RUTHERFORD COUNTY** – Special agents from the Tennessee Bureau of Investigation's Medicaid Fraud Control Division have obtained an indictment for a nurse in connection to a drug theft case.



SEARCH ...

### ON TWITTER

Tweets from  
**@TBIInvestigation**

 **Tennessee Bur**  
@TB... · May 30  
We've seen a lot of "ins  
of crime" over the years  
honestly say we've seen  
with one of these. 🙄  
#StandWithUs

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## MFCU Authority

- ▶ State Medicaid Agency must refer all cases of suspected provider fraud to the MFCU.
- ▶ MFCU has access to any records or information kept by the State Medicaid Agency.
  - ▶ This applies to contractors and providers.

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## Civil or Criminal Enforcement

Considerations  
in Choosing  
Tracks.

Parallel  
Proceedings.

Qui Tam  
Complaint.

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# Goals and Case Outcomes

- Deterrent.
- Financial Recovery.
- Program Exclusion.
- Use of Outside Monitor.
- Corporate Integrity Agreement.

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# Questions & Contact Information

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Session 403: Medicaid Fraud Enforcement  
Sponsored by Health Care Compliance Association

“The Defense Perspective”

Jack Wenik  
Member, Epstein, Becker & Green, P.C.

November 6th 2023; 3:15-4:15 EST

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## Other Players in Medicaid Fraud Enforcement

94 United States Attorneys Offices

Many States Have Multiple US Attorneys Offices

Policies and Practices Can Vary Dramatically by U.S. Attorney

Important Tactical Consideration for Defense Counsel Representing Providers with Multiple Locations

## Other Players in Medicaid Fraud Enforcement Cont'd



Multiple Federal Investigatory Agencies can Look into Medicaid Fraud



U.S. Department of Health and Human Services, Office of Inspector General (“OIG”) is Prominent in this Space



OIG Has a Health Care Fraud Self-Disclosure Protocol



A Target Can Make a Self-Disclosure Even While Under Investigation<sup>1</sup>

<sup>1</sup> *OIG's Health Care Fraud Self-Disclosure Protocol*, November 8, 2021 at 4.

## Other Players in Medicaid Fraud Enforcement Cont'd

In Addition to a MFCU, Many States also have a Medicaid Inspector General's Office Which Also Investigates Fraud

Examples: New York: Office of the Medicaid Inspector General; New Jersey: Office of the State Comptroller, Medicaid Fraud Division

Often are Independent of the State's Medicaid Agency

Many States Have Their Own Self-Disclosure Protocols With Generous Terms

- Example New Jersey Allows for waiver of penalties and sanctions and no interest for two years<sup>2</sup>

<sup>2</sup> New Jersey Office of the State Comptroller, Resource Last Accessed on October 9, 2023, <https://nj.gov/comptroller/resources/index.shtml>

## Agencies Often Combine Resources for Annual Fraud "Take Downs"

On June 28, 2023, the DOJ and law enforcement participated in a sweeping, coordinated law enforcement action to combat health care fraud

Criminal charges were brought against 78 defendants for their alleged participation in health care fraud and opioid abuse schemes

Charges involve over \$2.5 billion in alleged losses

Includes one of the largest health care fraud schemes ever prosecuted by the Justice Department

Schemes alleged: opioids, telemedicine, pharmaceutical, lab testing

Agencies involved, DOJ, HHS, OIG, FBI, DEA, state Medicaid Fraud Control Units, HIS, FDA, IRS-CI, VA-OIG, FDIC-OIG, OPM-OIG, Amtrak-OIG

## Medicaid Beneficiaries: End of a Free Ride?

- In response to the pandemic, states made it easier for beneficiaries to apply for and receive Medicaid benefits
  - For example, in NJ, Presumptive Eligibility applications can now be submitted via telephone <sup>3</sup>
- Similarly, states have made it easier for healthcare providers to enter the Medicaid program
  - For example, in NJ, online enrollment was initiated, application fees waived, reciprocity offered to providers licensed in other states, re-validation process was suspended <sup>4</sup>
  - Volume of investigations regarding beneficiaries has dramatically declined

<sup>3</sup> NJ DMAHS Newsletter, Volume 30, No. 14, May 2020

<sup>4</sup> NJ DMAHS Newsletter, Volume 30, No. 10, May 2020

## Since COVID-19 It Has Been Impossible to Remove Ineligible Recipients From the Medicaid Rolls

- The Secretary of Health and Human Services Declared the Existence of a Public Health Emergency on January 31, 2020
- This Declaration Had Been Continuously Extended Every 90 Days
- Throughout the Duration of the Public Health Emergency, CMS Has Imposed a Moratorium on Redeterminations of Medicaid Eligibility and Dis-enrollments <sup>5</sup>
- Beneficiary Fraud Investigations Were Essentially Halted

<sup>5</sup> Medicaid.gov; *Unwinding and Returning to Regular Operations after COVID-19*, located at <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html> (noting "states have been required to maintain enrollment of nearly all Medicaid enrollees").

## An Enormous Expansion of the Medicaid Rolls

- Because of “Continuous Enrollment” A Record 92 Million Individuals are Receiving Medicaid Benefits<sup>6</sup>
- CMS’s Ban on Eligibility Redeterminations Have Added 24 Million People to Medicaid Rolls<sup>7</sup>
- In New Jersey More than 1 in 5 People are Enrolled in Medicaid
- 15 Million Medicaid Enrollees Are Likely Ineligible for Benefits<sup>8</sup>

6 CMS June 2023 Medicaid and CHIP Enrollment Trends Snapshot at 3.

7 See, e.g., Wall Street Journal, August 15, 2022, lead editorial, *The Government’s Stealth Health Takeover* (noting with disapproval the increase in Medicaid rolls by 24 million people due to CMS’s ban on eligibility redeterminations).

8 Urban Institute, *What Will Happen to Medicaid Enrollees’ Health Coverage after the Public Health Emergency*, March, 2022, at 2.

## The Medicaid Party is Over

- The Public Health Emergency imposed as a result of COVID-19 Ended on May 11, 2023<sup>9</sup>
- The Federal Ban on Redeterminations has Been Lifted
- For Example, In New Jersey Redeterminations for 2 Million Beneficiaries Began on April 1, 2023<sup>10</sup>
- We Can Expect Beneficiary Fraud Investigations by Medicaid Inspector General’s Offices and Local Prosecutors’ Offices to Resume

9 Letter to U. S. Governors from HHS Secretary Xavier Becerra on renewing COVID-19 Public Health Emergency. February 9, 2023, located at: <https://www.hhs.gov/about/news/2023/02/09/letter-us-governors-hhs-secretary-xavier-becerra-renewing-covid-19-public-health-emergency.html>

10 Jennifer Langer Jacobs, *NJ Medicaid Resumes Eligibility Determinations April 1*, Garden State Focus Magazine, Winter 2022.

## Pre-COVID-19 There Was a Focus on Reducing the Medicaid Rolls via “Work for Medicaid”

- January 11, 2018, CMS Solicits Proposals for Pilot Programs Emphasizing “Work for Medicaid”
- February 1, 2018, CMS Approved Indiana’s “Work for Medicaid” Program
- Multiple Other States Soon Followed Suit, Submitting Applications to CMS with Many Receiving Approval
- Litigation Ensued, with Challenges Reaching the Supreme Court

## Dramatic Reversal of “Work for Medicaid” Requirements

- Expected Enforcement Efforts Against Beneficiaries Who Did not Fulfill “Work” Requirements Never Materialized Due to COVID-19, Other Factors
- Under the Biden Administration, CMS Began Withdrawing Approvals of “Work for Medicaid” Programs <sup>11</sup>
- Biden Administration Shut Down Supreme Court Review of the Issue <sup>12</sup>

<sup>11</sup> See, e.g., March 17, 2021 CMS Letter to Dawn Stehle of Arkansas Department of Human Services

<sup>12</sup> See, February 2021 Motion of Solicitor General in *Cochran v. Gresham*, No. 20-37

## “Work for Medicaid” is Not Dead

- Georgia Turned Back the Biden Administration’s Efforts to Shut Down its Program via Successful Litigation
- Other States May Follow Georgia’s Example
- Republican Legislators Continue to Push for the Enactment of “Work for Medicaid”<sup>13</sup>

<sup>13</sup> See, H.R. 1551 introduced in the House of Representatives on March 10, 2023.

## Predictions/Implications for Providers

Current Levels and Growth of Medicaid Rolls are Unsustainable.

Amnesty Programs for Ineligible Medicaid Beneficiaries Could be Re-established

Going Forward Providers Will Need to Carefully Verify Medicaid Coverage

Providers Who “Turn a Blind Eye” to Obvious Beneficiary Fraud Will Be at Risk

Medicaid Revenues Will Decline Significantly

“Work for Medicaid” Could Open Up Entirely New Fraud and Abuse Enforcement Efforts

## Federal Developments: New DOJ Self-Disclosure Policy for U.S. Attorneys' Offices

- On February 22, 2023, per the Direction of Deputy Attorney General Lisa O. Monaco, a Uniform Voluntary Self-Disclosure Policy was Promulgated for United States Attorneys' Offices
- No Corporate Guilty Plea if
  - “prompt” self-disclosure
  - “full” cooperation with government investigation
  - remediation of the criminal conduct

## Federal Developments: *Dubin v. United States*

- Significant Supreme Court decision, *Dubin v. United States*, No. 22-10, 599 U.S. \_\_\_\_ (2023), decided on June 8, 2023
- Interpreted Aggravated Identity Theft, 18 U.S.C. §1028A(a)(1)
- Aggravated Identity theft Carries a Two-Year Mandatory Prison Sentence



## Federal Developments: *Dubin v. United States* cont'd

- Prosecutors Routinely Added Aggravated Identity Theft Charges to Many Healthcare Fraud Prosecutions
- Used as Leverage in Plea Negotiations
- *Dubin* Decision Put a Stop to this, Aggravated Identity Theft can Only be Charged When it is the “Crux” of the Criminal Offense

## Telehealth Fraud: Implications for Medicaid Providers

- Document telehealth visits as thoroughly as in-person ones
- Beware of “impossible days”
- Pay attention to outliers/high volume billers
- Make sure practitioners/billing staff understand coding/billing requirements for different categories of telehealth: Virtual Check-ins, E-visits, Audio-only visits, etc.
- Maintain same distinctions between new vs. established patients as one would for in-person visits
- Provide Accommodations for Disadvantaged Populations; blind, non-English Speaking, and limited intellect, among others

## Opioids: Implications for Medicaid Providers

### Opioids

- Track opioid prescriptions
- Flag suspicious patterns
- Maintain meticulous documentation justifying prescriptions
- Take prompt action for any misconduct
- Consider self-disclosure to protect organization

## DME Fraud: Implications for Medicaid Providers

### DME

- Medical necessity hot button issue
- Need physical exam (do not rely on telehealth)
- Multiple devices are a red flag
- Flag unusual patterns
- Consider self-disclosure to protect organization

## Responding to A Medicaid Fraud/Abuse Enforcement Action: The Defense Perspective

- Important Strategic Considerations:
- Source of Investigation; MFCU vs. OMIG
  - MFCU More of a Law Enforcement Perspective
  - OMIGs More Regulatory Emphasis
    - Have Interest in Maintaining good providers
    - Can Make criminal referrals
- Providers Have Inspection/Oversight Obligations
- Balance Cooperation/Fifth Amendment, Criminal Defense

## Responding to A Medicaid Fraud/Abuse Enforcement Action: The Defense Perspective cont'd

- How Did the Enforcement Action/Investigation Start?
  - Data Mining
  - Administrative Inspection
  - Whistleblower
  - Internal Audit/Compliance Process
- Use of Outside Experts/Consultants
- State Self-disclosure Protocols

## Responding to A Medicaid Fraud/Abuse Enforcement Action: The Defense Perspective cont'd

Crucial Issues for Counsel/Providers:

- Suspension for “Credible Allegations of Fraud”
- Exclusion
- Monetary Penalties vs. Recoupment
- Criminal Exposure

## Raising an Inability to Pay Defense in Medicaid Enforcement Actions

- New DOJ guidance issued on September 4, 2020<sup>14</sup>
  - complete financial disclosures on detailed government forms (also tax returns, audited financial statements) under oath
  - DOJ will look at what caused financial condition and whether funds have been removed (dividends, distributions, loans, etc.)
  - DOJ will look to whether entity at issue can raise funds via borrowing, insurance or other means
  - DOJ will consider payment plans of 3 to 5 years with an initial large down payment, will be charged interest, and security must be posted
  - DOJ will consider “collateral consequences” such as harm to family members, entity’s operations

<sup>14</sup> Memorandum from Ethan P. Davis, Acting Assistant Attorney General, Civil Division.

## Raising an Inability to Pay Defense in Medicaid Enforcement Actions, cont'd

States often follow DOJ's lead, have similar criteria/procedures

For Example, NJ MFD has Detailed Financial Forms to Complete

- filled out under oath for entity and owners
- need 3 years of tax returns, financial statements, bank statements
- can supplement with additional documentation (eg. COVID-19 materials)

NJ MFD will Charge 6% Interest, Payment Period no longer than 5 years

## Questions?

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