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Hot Fraud Summer: DOJ's Latest Criminal Takedown

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The U.S. Department of Justice (DOJ) Criminal Division's Health Care Fraud Strike Force announced the results of its latest nationwide enforcement action on June 27, 2024, one year (almost to the day) since its last major takedown event. For those on the defense end of the health care fraud world, midsummer is becoming a time of high tension, as DOJ's prosecutors race to the grand jury over the course of roughly a week so their indictments may be counted on this enforcement action scorecard. While other smaller takedowns may occur throughout the year (for example, the April 2023 Covid-19 enforcement action alleging $490 million in intended loss), the all-inclusive summer blockbuster is where the splashiest indictments can be found.

This year's summer enforcement saw more than twice as many indictments as last year's, but only a 10% increase in intended loss associated with those alleged crimes. With a total of 193 defendants indicted and $2.75 billion of intended losses charged, DOJ's 2024 brag sheet features a wide array of health care crimes, ranging from classic telemedicine schemes to diversion of HIV medication. The drop in average dollars per indictment may indicate DOJ is pivoting harder towards non-monetary objectives (such as preventing patient harm); it could be a sign that this takedown features some sprawling, top-heavy conspiracies where only a few of the defendants made off with substantial amounts of money; or it could simply be a fluke.

A clue to this mystery might be the fact that of the 193 defendants, only 76 were licensed medical professionals – which could indicate a large number of lower-level defendants such as patient recruiters, who typically reap very little of the monetary rewards themselves. Of course, those rewards do go somewhere, as evidenced by the

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White Collar Defense & Government Investigations significant amount of cash and assets seized by DOJ concurrent with these alleged crimes. Luxury vehicles, gold, jewelry, and tens of millions of dollars were captured by the government through seizure warrants, each ostensibly the fruits or instrumentalities of crimes alleged in the takedown indictments.

Notably, almost a third of the intended loss figure derives from the indictment of just four individuals in the District of Arizona. These indictments centered around an alleged kickback scheme targeting elderly Medicare patients to convince them to receive costly amniotic wound grafts. These grafts involve the transfer of donated placental tissue onto the site of a wound. Because of the unique properties of this tissue, recipients' immune systems typically do not view the tissue as foreign and therefore no rejection response is provoked. The procedure, which is proven to reduce pain, healing time, and post-graft scarring, does not come cheaply – per the DOJ press release, these defendants received over $1 million per patient from Medicare. DOJ alleges these grafts were medically unnecessary, were applied improperly, and were applied in measures disproportionate to the patients' wounds.

Absent from DOJ's summary of the Arizona indictments is any description of patient harm resulting from the allegedly overzealous application of expensive skin grafts. And while DOJ seems to allege the grafts were applied to wounds too insignificant to warrant this treatment, such an allegation seems likely to rely on the practitioners' medical judgment rather than any legal principle. Given the U.S. Supreme Court's 2022 decision in *Ruan v. United States* (holding that the government must show a practitioner *knew* she was practicing outside of her medical authority), it will be interesting to see whether DOJ can actually hold onto this impressive loss figure.

Of course, none of this is to say that DOJ has spent the last year hunting only for deep pockets at the expense of patient safety. The press release features several pharmaceutical-adjacent indictments, including an Adderall distribution scheme in which some patients allegedly overdosed and died. These drug schemes are certainly less flashy than those involving cutting-edge, gold-plated skin grafts, but DOJ's decision to highlight them affirms its commitment to the cause of public health.

Now that this summer's criminal enforcement action has come to a close, it is likely that the rate of indictments will drop precipitously, allowing prosecutors and prospective criminal defendants alike to take a breath before gearing up for the next round. However, the pipeline between Civil Fraud and Criminal Fraud will continue to flow unabated in the interim. Civil actions under statutes such as the False Claims Act (FCA), Anti-Kickback Act (AKA), and other civil fraud statutes are sure to spring up from the various leads and investigations that did not quite make the cut for criminal prosecution. And while FCA and AKA enforcement may not sound as ominous as a criminal charge, the financial and administrative consequences of those actions can be just as devastating to a health care defendant (think triple damages and/or suspension from participating in Medicare, Medicaid, or any other government-funded health care program). Compliance professionals will be well-served to stay vigilant on the civil front, even if criminal enforcement is pausing briefly to catch its breath.

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