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Pharmacy President Sentenced For Pill and Pain Cream Scam. Will Physicians Become Cellmates?

“Take two pills and call me in 1,095 mornings.”

That’s essentially the message sent by the judge to Elan Yaish, the former president of New Jersey pharmacies including Apogee Bio-Pharm LLC, of Edison, when he was sentenced on January 18, 2024, to three years in federal prison for his role in a health care kickback conspiracy involving prescriptions for Medicare and TRICARE beneficiaries. Has was also ordered to make restitution of $32 million.

Perhaps Mr. Yaish didn’t read our blog, but the scheme to which he pleaded guilty was cut from the usual “pain cream” scam pattern. [Take a look at Greasy Kickback Residue Is All That’s Left of Pain Cream Fraud and at Compound King Breaks Bad, Gets Creamed.]

As reported by the U.S. Department of Justice, documents filed in the Yaish’s case and statements made in court demonstrate that Yaish and others agreed to engage in a scheme to pay marketing companies to direct prescriptions for expensive medications to the pharmacies:

1. The marketing companies identified Medicare and TRICARE beneficiaries to target for expensive drugs and contacted the beneficiaries by telephone to pressure them to agree to try expensive medications, such as pain creams, scar creams, eczema creams, and migraine medication.
2. The marketing companies then transmitted recordings of telephone calls with the beneficiaries, together with pre-marked prescription pads for particular drugs that would yield exorbitant reimbursements, to telemedicine companies.
3. The marketers paid the telemedicine companies kickbacks for every beneficiary referred for a prescription, and the telemedicine companies paid doctors to approve the prescriptions.
4. The marketing companies then directed the prescriptions to pharmacies, including Apogee, with which they had kickback arrangements.
5. The pharmacies filled the prescriptions and sought reimbursement from federal health care benefit programs, including Medicare and TRICARE. The pharmacies, including Apogee, then paid a portion of each reimbursement to the marketing companies as a kickback.

As a result of the scheme, Yaish and his conspirators caused a loss to Medicare and other federal health care benefit programs of over $32 million.

Other Apogee executives and at least one pharmacist have been charged in related prosecutions.

In cases such as these the usual process is for prosecutors to follow the web of the alleged conspiracy. As participants plead out and confess their roles and flip on their co-conspirators, additional defendants are prosecuted.

These sorts of schemes require physician involvement via telehealth companies and it's likely only a matter of time, if they haven't already been charged, for physician defendants to be named.

Some More Points for Physicians to Ponder

In 2022, the U.S. Department of Health and Human Services Office of Inspector General ("OIG") issued a new Special Fraud Alert urging caution when entering into arrangements with telehealth companies.

Here, in encapsulated form, is what you need to know:

1. These schemes, which abound, exploit the public's acceptance of remote treatment tech, and purport to use telehealth, telemedicine, or telemarketing services.
2. In some of these schemes, the companies intentionally pay physicians kickbacks to prescribe prescription medication. Other schemes involve unnecessary DME, genetic testing, and wound care. All result in fraudulent claims to Medicare, Medicaid, and other Federal health care programs.
3. Although the breadth of scams is wide both in type, as mentioned above, and in operation, e.g., call centers, staffing companies, marketers, brokers, etc., the commonality is the use of kickbacks to recruit and reward the practitioners.
4. Generally, the telemedicine companies solicit and recruit purported patients and shunt them to practitioners, with the aim of arranging for the order or prescription of medically unnecessary items and services for individuals with whom the practitioners have limited, if any, interaction, and without regard to medical necessity.
5. Payments to practitioners are sometimes described as payment per review, audit, consult, or assessment of medical charts.
6. The telemedicine companies often tell practitioners that they do not need to contact the purported patient or that they only need speak to the purported patient by telephone.
7. Practitioners are not given an opportunity to review the purported patient's real medical records.
8. The telemedicine company may direct the practitioner to order or prescribe a preselected item or service, regardless of medical necessity or clinical appropriateness.
9. In many cases, the telemedicine company sells the order or prescription generated by practitioners to other individuals or entities that then fraudulently bill for the unnecessary items and services.

The Special Fraud Alert includes a nonexclusive list of telehealth/telemedicine fraud scam characteristics for you to keep in mind:

- The purported patients for whom the practitioner orders or prescribes items or services were identified or recruited by the telemedicine company, telemarketing company, sales agent, recruiter, call center, health fair, and/or through internet, television, or social media advertising for free or low out-of-pocket cost items or services.
- The practitioner does not have sufficient contact with or information from the purported patient to meaningfully assess the medical necessity of the items or services ordered or prescribed.
- The telemedicine company compensates the practitioner based on the volume of items or services ordered or prescribed, which may be characterized to the practitioner as compensation based on the number of purported medical records that the practitioner reviewed.

- The telemedicine company only furnishes items and services to Federal health care program beneficiaries and does not accept insurance from any other payor.
- The telemedicine company claims to only furnish items and services to individuals who are not Federal health care program beneficiaries but may in fact bill Federal health care programs.
- The telemedicine company only furnishes one product or a single class of products (e.g., durable medical equipment, genetic testing, diabetic supplies, or various prescription creams), potentially restricting a practitioner's treating options to a predetermined course of treatment.
- The telemedicine company does not expect practitioners (or another practitioner) to follow up with purported patients nor does it provide practitioners with the information required to follow up with purported patients (e.g., the telemedicine company does not require practitioners to discuss genetic testing results with each purported patient).

The danger to physicians and other practitioners considering participation in these arrangements is that they potentially implicate multiple Federal laws, including the Federal anti-kickback statute (the "AKS"), the Federal criminal law that prohibits knowingly and willfully soliciting or receiving (or offering or paying) any remuneration in return for (or to induce), among other things, referrals for, or orders of, items or services reimbursable by a Federal health care program. Other triggered laws include the Civil Monetary Penalty Law, the criminal health care fraud statute, and the Federal False Claims Act. Penalties range from multi-year prison terms to significant fines to very large civil penalties.

Often lost on physicians is the fact that even though they might not be the moving party involved in the scam, liability falls on both sides of a kickback scheme. In other words, you can be personally liable, criminally and civilly, in connection with these scams, including for submitting or causing the submission of claims.

With lots of money at play, it's not hard to see why the government is motivated to investigate and prosecute in order to obtain huge fines and the benefit of the forfeiture (generally to the investigating agency) of scores of millions of dollars.

Some final takeaways for you:

Any deal must be structured in compliance with the federal Anti-Kickback Statute, Stark, and various state law counterparts and other restrictions.

Money, big money, is tempting. I know because I've counseled many clients in connection with telemedicine "ventures" paying what they must have thought was money from heaven.

Yes, telemedicine has many valid applications. Violation of the AKS and committing fraud are not among them.

And, the money's not from heaven. It's from hell.

Wisdom. Applied. - 184: Hospital CEO Gets A Raise. You? We're Not So Sure.

A study found little correlation between nonprofit hospitals' CEO pay, which averaged almost $600,000 per year, and performance.

All Things Personal

Selling out.

The term has many meanings in English, from the sale of a business to, just as an example, the near-expletive form “sell out”, whose meaning is to abandon one’s own principles to seek personal advantage (once a highly fashionable invective hurled those with nothing anyone else finds of value).

For physicians, selling out was, and for some remains, fashionable in the sense of selling their practice to investors of one scent or another, from hospitals to private equity to publicly traded behemoths like Optum.

Because this is my “All Things Personal” column, let’s make it personal. We’ll use someone I know, an office practice doc, as Exhibit “A”. In fact, let’s call her “Dr. Exay”.

Once upon a time, Dr. Exay fell for the line, “you practice medicine, let us run the business”, and seeing the small handful of gold shoved across the table, sold her practice to one of those aforementioned consolidators. Yet she failed to see farther down the road.

As I often counsel, there are two purchase prices that any physician must consider in connection with a sale: The first is the price you, as the seller receive (e.g., the small handful of gold Dr. Exay received). The second is the price you, as the seller, pay

“What! Wait a second!” some reader of this column screams. “Sellers don’t pay the price, they receive it.” Ah, therein lies the error in thinking.

For, post-sale, the seller, like my Dr. Exay, does pay a price in terms of a relationship with the wrong buyer.

In Dr. Exay’s case, this was a severe ratcheting up of the number of patients she was required to see each day, the decrease in support staff, the reduction in investment in medical equipment and supplies, and the no-we-can’t-legally-require-it but just as real pressure to make referrals only to other physicians also employed by the buyer.

As is increasingly being reported in the industry and popular press, Dr. Exay became increasingly dissatisfied with practice. She became “burnt out” in the common vernacular. Once her employment contract term ended, she voted with her feet and set up an independent practice. Sure, the road from there was a bit bumpy but she’s succeeded and is no longer a wage slave.

The moral is not that it’s never a good idea to sell one’s practice. Rather, it’s to consider that if you simply focus on one side of the equation, what you’ll be paid, you’ll discount, or completely ignore what it will cost you in the long run.

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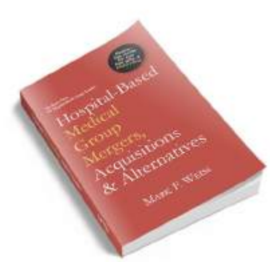
Books and Publications

We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the "default" route. That's the one is which you let someone else make the decisions that impact you; you're just along for the ride. Of course, playing a bit part in scripting your own future isn't the smart route to stardom. But despite your own best intentions, perhaps it's your medical group's governance structure that's holding you back. In fact, it's very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy here.



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1. Download a copy of The Success Prescription. My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription here.

2. Be a guest on "Wisdom. Applied. Podcast." Although most of my podcasts involve me addressing an important point for your success, I'm always looking for guests who'd like to be interviewed about their personal and professional achievements and the lessons learned. Email me if you're interested in participating.

3. Book me to speak to your group or organization. I've spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, drop us a line.

4. If You're Not Yet a Client, Engage Me to Represent You. If you're interested in increasing your profit and managing your risk of loss, email me to connect directly.