Monday, March 30, 2020

As the United States continues to take unprecedented steps to address the escalating COVID-19 pandemic, including passing the largest stimulus package in modern American history last week, the Department of Justice ("DOJ") is also taking measures to protect patients and taxpayers from unscrupulous health care providers and other individuals intent on taking advantage of the global crisis. As we reported last week, the Attorney General promptly directed all U.S. Attorneys to prioritize the investigation and prosecution of COVID-19 related fraudulent schemes and announced that targeted investigations were already ongoing into individuals attempting to take advantage of the pandemic. We warned that one industry in particular had significant enforcement exposure given—the telehealth industry.

Today, the United States Attorney’s Office for the District of New Jersey announced that it has charged one such individual—Erik Santos, 49, of Braselton, Georgia—with one count of conspiring to violate the Federal Anti-Kickback Statute and one count of conspiring to commit health care fraud. The complaint specifically alleges that Santos ran a marketing company that generated leads to testing companies and, from November 2019 through the present, he and others engaged in a large-scale scheme to defraud Medicare. Santos’s fraudulent scheme began with CGx and PGx testing—another main focus of the DOJ since August—in which he would solicit and receive kickback payments from companies involved in clinical and diagnostic...
testing, including laboratories, physician groups, and telemedicine companies. In exchange, Santos steered Medicare patients to those companies knowing that Medicare reimbursements would be paid out for thousands of dollars. The DOJ said that Santos agreed with others to be paid kickbacks on a per-test basis for submitting genetic cancer screening tests to diagnostic testing facilities, regardless of medical necessity or a prior doctor-patient relationship.

According to the complaint, Santos quickly adapted his fraudulent conduct in March 2020 once news of the Coronavirus began to spread. Santos planned “to specifically target Medicare beneficiaries who were not exhibiting symptoms of COVID-19 or were otherwise unlikely to test positive for the virus,” so that he could attach and bill for a much more expensive respiratory pathogen panel (RPP) test—notably this RPP test cannot test for COVID-19. Santos explained that he viewed the pandemic as a money-making opportunity and in one telephone conversation, he was quoted as saying, “[W]hile there are people going through what they are going through, you can either go bankrupt or you can prosper.” The DOJ stepped in before Santos had an opportunity to “prosper,” and arrested him at his home in Georgia this morning.

The DOJ’s efforts are likely to continue as COVID-19 continues to spread throughout the world and even after the pandemic subsides and the public begins to return to their normal daily activities, and are almost certain to include civil and criminal enforcement actions, False Claims Act lawsuits, and the harnessing of other tools and initiatives available to the Government to help root out health care fraud and abuse. It is therefore important as ever to maintain a watchful eye over your health care operations and avoid running afoul to federal health care regulations and statutes.

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