Key Case Interprets California's Criminal Insurance Fraud and Self-Referral Laws

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An important case last week interprets California criminal insurance fraud and self-referral laws. *See Banerjee v. Superior Ct. of Riverside County*, 2021 WL 4551699 (Cal. Ct. App. Oct. 5, 2021). The case is important because there are no regulations interpreting these laws, and little other guidance or case law.

The case involves a physician who operated his medical practice through three separate legal entities – one for diagnostic imaging, one for ambulatory surgery, and a professional corporation ("PC") for his professional services. All three businesses provided services from the same medical office, although part of the office was devoted to diagnostic imaging, part to ambulatory surgery services, and the rest to the physician's professional services. The physician's charges for the diagnostic imaging and ambulatory surgery services performed through these two businesses were substantially higher than the physician's usual and customary charges for the same services, when previously billed through his PC. The physician sought to dismiss the charges after a preliminary hearing but before a trial on the merits.

The physician was accused of insurance fraud on the basis that the diagnostic imaging and ambulatory surgery businesses were established with the specific intent of defrauding insurers by overcharging them for the services performed through these businesses, compared to the physician's previous usual and customary charges for the same services billed through his PC. The physician was also accused of perjury because he signed forms under penalty of perjury stating that he did not violate California's self-referral law (which prohibits physicians from referring patients for certain services to an entity with which they have a "financial interest" unless an exception applies). The government asserted that the physician's ownership of these businesses constituted a financial interest that did not satisfy any exception. The physician contended, among other arguments, that he did not have to comply with the referral prohibition because he provided notice to patients of his ownership in the three businesses as required by the self-referral statute. Significantly, the government did not base the perjury charge on the physician's alleged failure to comply with the disclosure requirement.

Regarding the insurance fraud allegations, the court held the "… evidence supports a strong suspicion" that the only business reason the physician formed

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the diagnostic imaging and outpatient surgery businesses was "to use them to submit highly inflated billings" to the patients' insurer. Regarding the self-referral allegations, the court held compliance with the disclosure requirement did not excuse noncompliance with the self-referral prohibition and that the failure to comply with the disclosure provision could give rise to criminal liability, although this was not charged. The court, however, also held that the physician's referrals ***did*** satisfy the self-referral law's exception for services performed within a physician's office, even though the physician used three separate legal entities, ruling that there is no requirement that a physician use only one legal entity in order to satisfy this exception. Accordingly, the court dismissed the perjury charges.

The key takeaways from this case are (1) while providers are generally free to own and operate multiple healthcare businesses and establish charges as they see fit, the way each business is established and operated should be carefully considered to minimize legal exposure, (2) the patient disclosure requirement in California's self-referral law is quite broad, and compliance must be satisfied and documented to avoid potential liability, and (3) the "physician's office" exception to California's self-referral law is fairly accommodating, and typically provides more flexibility to physician office practices than its federal counterpart (generally known as the "Stark" law).

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