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CLIENT ALERT

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From Frying Pan to Fire: Strategic Issues When Reimbursement Disputes Turn Into Criminal Investigations

Early on the morning of June 13, 2017, over one hundred federal agents raided facilities across southern California belonging to behavioral health provider Sovereign Health. The agents provided search warrants indicating that they were seeking evidence of fraudulent billing and kickbacks. The items sought suggested a potential connection to a civil lawsuit that Sovereign had filed against insurer Health Net for bad faith denial of insurance claims, as well as cross-claims for fraud and kickbacks that Health Net had filed in response. Sovereign eventually collapsed. On May 5, 2020, it filed a federal racketeering lawsuit against Health Net, its parent company Centene Corp., and several of Health Net's outside counsel, accusing them of providing false information to the government in order to induce the investigation and force Sovereign out of business. [Dual Diagnosis Treatment Center, Inc., et al. v. Centene Corp., et al.](#), Case No. 2:20-cv-04112 (C.D. Cal.).

While perhaps a dramatic example, the Sovereign case is hardly the only one in recent years in which a private insurer has allegedly encouraged law enforcement to pursue a provider, sometimes while the insurer and provider are engaged in a dispute. For example, beginning in 2016, [insurers](#) sued several dialysis providers for paying kickbacks through a charity, while a related [DOJ investigation](#) was underway. In October 2018, Blue Cross Blue Shield of Tennessee [confirmed](#) that it was cooperating with the Department of Justice in the prosecution of various individuals and companies allegedly involved in a \$174 million telemedicine fraud against private insurers. And earlier this month, the Eleventh Circuit affirmed the convictions of two Alabama doctors for defrauding private insurers and others; a Blue Cross Blue Shield employee testified in the trial as a government witness. See [United States v. Ruan](#), Case No. 17-12653.

Criminal cases involving commercial health insurers often proceed in parallel with civil litigation between the payer and provider. In some cases, the payer asserts an overpayment and initiates litigation including fraud claims. In others, the provider sues for non-payment or underpayment, and the insurer either defends or countersues by alleging fraud. However the dispute arises, insurers have become increasingly aggressive in referring fraud claims to law enforcement agencies, including DOJ, in connection with the civil litigation. Often, these referrals are made through the insurers' Special Investigative Units and counsel, sometimes with the hope of gaining additional leverage in the dispute. As in any situation

featuring overlapping criminal and civil cases, such collaborations between insurers and prosecutors are rife with strategic and procedural landmines for both sides.

One of these critical issues that often arises for the provider in the civil case is [whether to assert the Fifth Amendment](#) and refuse to testify. If a provider does so in federal civil court, it can result in the judge or jury drawing adverse inferences that can be devastating to the provider's case. Even in the state courts of California or other jurisdictions that prohibit such adverse inferences, asserting the self-incrimination privilege can make it harder for the provider to introduce helpful evidence. But waiving the Fifth Amendment and testifying can provide valuable fodder for the government in the criminal case, which may prove even more dangerous. For that reason, the provider may seek a stay of the civil case until the criminal matter is completed, which may delay resolution of the payment issue but can avoid the self-incrimination dilemma.

On the other side of the coin, the civil proceeding may offer the provider certain advantages in the criminal case. In particular, civil litigation allows for much broader discovery than is generally afforded to criminal defendants. A provider facing parallel cases can use depositions, document requests, and other discovery devices to pin down testimony from key witnesses, extract exculpatory admissions, and obtain documents useful for his defense, all of which might be unavailable in a criminal case. For that reason, the provider might choose risk defeat in the civil case by not pursuing a stay, while the government might instead ask to suspend the civil proceeding. In other cases, the government may not seek a stay, but instead ask the court for a protective order barring discovery of witnesses' communications with the government, or other information the disclosure of which could undermine the criminal investigation. *See State Compensation Ins. Fund v. Drobot*, 2016 WL 3546583 (C.D. Cal. Feb. 29, 2016).

The government and payer, too, must be careful in pursuing a coordinated attack. Courts have held that the government may not secretly use a civil proceeding to obtain information for a criminal case. *See United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008). In other cases, they have found that the government's excessive direction of a private actor's dealings with a criminal defendant render that private actor a government agent, whose actions can violate the defendant's constitutional rights. *See United States v. Connolly, et al.*, Case No. 16-cr-370 (S.D.N.Y.) If the government and insurer appear to be working too closely, and one seems to be taking too much direction from the other, a court could find misconduct or perhaps order additional discovery from the insurer in a criminal case. At a minimum, close involvement between the two could provide a line of defense in the criminal case regarding the bias or improper motives of the government. A similar defense was successful in the [recent acquittal of a Fitbit executive](#) on criminal trade secrets charges apparently prompted by a competing company's advocacy.

Like anyone who provides information to law enforcement, insurers referring matters to the government must also be both scrupulously accurate and reasonably thorough in their disclosures. If an insurer give false or misleadingly incomplete evidence to the government in order to persuade it to pursue charges against a provider in order to gain a litigation advantage, it could be subject to a claim of malicious prosecution, or even criminal false statements charges under [18 U.S.C. § 1001](#). Such allegations of false accusations provided part of the basis of Sovereign Health's RICO lawsuit against Health Net, discussed above.

While civil disputes and criminal investigations may sometimes mix, particularly in the case of provider-insurer reimbursement disputes, they raise both the stakes and the complexity in both proceedings. Navigating such parallel proceedings requires careful planning and counsel with experience in both the civil and criminal realms.

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