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FEE FORGIVENESS UNDER THE FEDERAL HEALTHCARE FRAUD AND ABUSE STATUTES

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Fee forgiveness, also referred to as copay waivers or coinsurance waivers, refers to the practice by healthcare providers of voluntarily forgiving a patient's required cost-sharing obligations under their insurance plan. Generally, these cost-sharing obligations may include a mandatory deductible or copay that the patient must pay before the insurer will contribute to the patient's care under the terms of the plan. Fee forgiveness involves a provider waiving payment of these fees by the patient.

There are several reasons why providers may choose to forgive a patient's fee obligations, including providing relief to financially burdened patients or encouraging patients to seek necessary care that would otherwise be avoided due to their cost-sharing obligations. One reason this may be problematic is because it may induce other providers to refer patients to fee-forgiving providers. Other providers may be more inclined to refer their patients to another provider who routinely waives deductibles and copays. While this practice may reduce out-of-pocket costs for patients, it poses a particular problem when the referred patients are insured under a federal healthcare program (e.g., Medicare or Medicaid). Such referrals raise issues under federal healthcare fraud and abuse statutes.

Healthcare fraud and abuse statutes

The Anti-Kickback Statute and False Claims Act

The federal Anti-Kickback Statute (AKS) "prohibits payments in exchange for referrals to federal healthcare programs."[1] Specifically, the AKS makes it unlawful to:

> *[. . .] knowingly and willfully [offer] or [pay] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person [. . .] to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program.*[2]

The AKS is violated if a single purpose of the payment was to induce referrals, even if the payment was also intended to compensate for services.[3]

The False Claims Act (FCA) imposes liability on anyone who

"knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[4] A "claim" includes requests for reimbursement by the government directly, in addition to reimbursement requests to recipients of federal funds pursuant to a federal benefits program.[5] A falsehood is "material" under the FCA if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[6]

One specific type of FCA claim is a "presentment claim." An FCA presentment claim arises when a claim for payment that is submitted to the government rests on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term.[7] Notably, AKS liability turns on inducement of referrals, whereas FCA liability may arise from the submission of claims tainted by such conduct—even where the inducement theory is less direct.

OIG Special Alerts and the *Medicare Claims Processing Manual*

In addition to the federal statutes themselves, additional sources of law pertaining to fee forgiveness under the healthcare fraud and abuse statutes include the U.S. Department of Health and Human Services Office of Inspector General (OIG) Special Fraud Alerts.

Medicare Claims Processing Manual

OIG Special Fraud Alerts aim to inform the public about specific issues related to healthcare fraud and the government's efforts to combat them. In 1994, OIG issued a Special Fraud Alert specifically addressing cost-sharing fee forgiveness practices and their implications under the AKS.[8] It explains that cost-sharing fee forgiveness schemes intended to induce referrals under any federal healthcare program are illegal under the FCA and AKS.[9] The 1994 Special Fraud Alert does, however, establish an exception that providers may forgive patient deductibles and copayments "in consideration of a particular patient's financial hardship" provided that this exception is not used routinely and is particularized to the special financial needs of specific patients.[10]

The prohibition on fee forgiveness schemes intended to induce referrals is echoed in the *Medicare Claims Processing Manual*, which states:

> *Physicians or suppliers who routinely waive the collection of deductible or coinsurance from a beneficiary constitute a violation of the law pertaining to false claims and kickbacks. [. . .] Deductible and coinsurance amounts are taken into account (included) in determining the reasonable charge for a service or item. In this regard, a billed amount that is not reasonably related to an expectation of payment is not considered the "actual" charge for the purpose of processing a claim or for the purpose of determining customary charges.*[11]

It is clear, therefore, that fee forgiveness schemes intended to induce referrals violate the FCA and AKS. The case law analyzing specific practices of fee forgiveness provides greater insight into the boundaries of these prohibitions and how practitioners can remain in compliance when engaging in fee forgiveness.

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Fee forgiveness case law

Courts nationwide have provided guidance on how these principles apply in practice.

The Northern District of California addressed fee forgiveness in the case of *United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC*.[12] The case involved a whistleblower claim under the FCA against the defendant, a California-based medical laboratory.[13] The complaint alleged, in relevant part, that the defendant engaged in a scheme by which it promised providers that their patients would not have to pay more than $25 to satisfy the patient deductible and copayment obligations under private insurance plans.[14] The defendant also allegedly promised providers it would not send unpaid copays and deductibles

to collections.[15] The plaintiff alleged this fee forgiveness scheme was intended to induce providers to refer greater numbers of patients to the defendant under both private insurance and Medicare/Medicaid specifically.[16] The plaintiff raised two FCA violations based on these allegations: (1) presenting false claims; and (2) creating or utilizing false records or statements pertinent to the payment of false claims.[17] The defendant moved to dismiss these claims, arguing that the complaint only alleged conduct regarding false claims for payment under private insurance, rather than Medicare/Medicaid, and the complaint failed to allege that any fee waivers were not made to patients due to financial hardship, which were permitted by the 1994 Special Fraud Alert.[18]

The Northern District rejected both arguments.[19] First, the court reasoned that, while the 1994 Special Fraud Alert offered, as an example, a scenario in which a provider waived patient deductibles and copays under Medicare/Medicaid plans, this does not mean the alert is limited to public insurance and the AKS specifically prohibits providing anything of value as an inducement for referrals, which was implicated by the allegations that the fee forgiveness for private-insured patients was intended to induce Medicare/Medicaid referrals in this case.[20] Second, the court considered the financial hardship argument and found that, even if one motivation of the fee forgiveness scheme was to aid patients experiencing financial hardship, the complaint alleged another possible motivation–inducing additional referrals for the defendant's monetary benefit.[21] The court thus held that, if there was any illegal motivation for the scheme, this was sufficient to allege a cause of action under the FCA for a fee forgiveness scheme.[22] On these bases, the court denied the defendant's motion to dismiss the FCA claims regarding the fee forgiveness scheme.[23]

The District of South Carolina considered similar issues in the case *United States of America, et al. v. Berkeley Heartlab, Inc., et al.*[24] The case involved allegations that a blood testing laboratory waived the deductibles and copays for patients covered by Medicare and TRICARE plans to allegedly induce providers to refer larger numbers of patients to the defendant.[25] The plaintiffs' complaint raised causes of action under the AKS and FCA in relation to the fee forgiveness scheme.[26] The defendants moved to dismiss these claims, arguing the plaintiffs failed to state causes of action under both fraud statutes.[27] The court disagreed, holding the defendants' arguments that the plaintiffs were required to specify which specific claims presented for payment were fraudulent (rather than merely alleging that all claims presented were fraudulent) and that the plaintiffs were required to specify which individual employees of the defendants submitted the false claims for scienter purposes were unavailing and legally incorrect.[28] Accordingly, the court denied the defendants' motion to dismiss the AKS and FCA claims regarding the fee forgiveness scheme.[29]

In *United States of America, et al. v. Chang*,[30] the Central District of California considered a dispute arising from certain physician practice groups allegedly routinely waiving cost-sharing amounts for Medicare patients without conducting any financial hardship inquiry.[31] The plaintiffs, former officers with the physician practice groups, brought suit against the defendants for violations of the AKS and FCA, alleging the across-the-board fee forgiveness for Medicare patients violated both statutes.[32] The defendants moved to dismiss, arguing, in relevant part: (1) the defendants did provide financial hardship forms to patients; therefore, the FCA causes of action are meritless; and (2) the copay waivers were offered directly to patients—not providers; therefore, providers were not offered or given anything of value in exchange for referrals, rendering the AKS claims meritless.[33] The court rejected the first argument, finding that, while financial hardship forms were provided to patients, the complaint alleged these forms were never reviewed by defendants' staff, and copay waivers were provided across the board regardless of the forms.[34] As to the second argument, the court agreed with the defendants that, when copay waivers are offered directly to patients and there are no specific allegations that these waivers were provided for the benefit of providers in exchange for referrals, there can be no AKS cause of action because the AKS restricts offering or providing anything of benefit "to any person to induce such person[] to refer an individual . . . to a provider for services covered by any federal health care program."[35] Because the copay waivers were not offered to the providers in this scenario, there could be no inducement to these providers for referrals.[36] The court partially granted and partially denied the defendants' motion to dismiss on these bases.[37]

The *Chang* case may appear to be in tension with the *Vibrant America* case previously discussed, but the allegations in *Vibrant America* involved stronger ties between the fee forgiveness scheme allegedly employed by the defendants and the physicians the defendants were allegedly trying to induce. The court in *Chang* makes clear that, aside from merely informing providers that patients' copays were waived, the defendants did little to influence providers to issue patient referrals. The distinction between the two cases appears to be the degree to which the defendants attempt to offer patient fee forgiveness to providers as an incentive to refer patients.

United States of America, ex rel. Brenda Sharp v. Eastern Oklahoma Orthopedic Center[38] involved an alleged fee-forgiveness scheme under review in the Northern District of Oklahoma.[39] The lawsuit was filed by a former employee of an orthopedic practice and raised several claims under the FCA, including violations of the AKS, arising from the defendant's alleged practice of routine cost-sharing fee forgiveness allegedly to benefit the defendant's employees and their families who were treated by the defendant.[40] The defendant moved to dismiss the complaint, arguing that because the alleged fee forgiveness scheme was only offered to defendant's employees and their families, who were already existing patients of defendant, the scheme could not have been intended to induce referrals.[41] The court analyzed the case along the same lines of reasoning as the court in *Chang* and found that the allegations were sufficient to allege an FCA claim, but not an AKS claim because there was no alleged purpose to induce the patients to provide referrals to the defendant.[42] The court thus granted the defendant's motion to dismiss as to the AKS claim and denied the motion as to the FCA claim.

These cases collectively demonstrate that the degree of connection between fee forgiveness and referral behavior is often determinative, particularly for AKS liability, while FCA exposure may arise more broadly from claims tainted by improper practices.

Fee forgiveness practices can be attractive to providers, but once they cross into efforts to induce patient referrals from other providers, FCA and AKS issues arise.

Conclusion

Fee forgiveness practices can be attractive to providers, but once they cross into efforts to induce patient referrals from other providers, FCA and AKS issues arise. The case law across various jurisdictions analyzing specific examples of fee forgiveness practices is instructive for understanding how courts view

these practices. The link between fee forgiveness and attempts to influence provider referrals will always be the key consideration.

From a compliance perspective, providers should ensure that fee forgiveness policies:

- Prohibit routine or across-the-board waivers;
- Require individualized, documented financial hardship determinations;
- Are not marketed or used as a referral incentive; and
- Include auditing and oversight mechanisms to ensure consistent application. CT

Endnotes

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14. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 1.
15. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 2.
16. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 1.
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19. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 15.
20. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 15.
21. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 16.
22. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 16.
23. United States of America, Ex Rel. STF, LLC, et al. v. Vibrant America, LLC, at 22.
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36. United States of America, et al. v. Chang, et al., at 8 (quoting 42 U.S.C. § 1320a–7b(b)(2)(A)).
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Takeaways

- Fee forgiveness may help patients financially, but it can implicate the Anti-Kickback Statute (AKS) if used, even in part, to induce referrals for federal healthcare programs.
- Routine or across-the-board waivers of Medicare or Medicaid deductibles and copays—without a bona fide financial hardship inquiry—raise significant False Claims Act (FCA) and AKS liability risks.
- The U.S. Department of Health and Human Services Office of Inspector General's 1994 Special Fraud Alert recognizes hardship-based waivers but indicates that schemes to induce referrals are unlawful.
- Courts have held that fee forgiveness schemes can violate the FCA even when waived fees relate to private insurance, if referrals for federal programs are partly induced.
- To mitigate risk, providers should document each patient's financial hardship, avoid tying fee waivers to referrals, and ensure forgiveness is not motivated by securing new referrals.