MedChi

The Maryland State Medical Society

1211 Cathedral Street
Baltimore, MD 21201-5516
410.539.0871
Fax: 410.547.0915

1.800.492.1056

www.medchi.org

TO: The Honorable Brian Frosh, Chairman
Members, Senate Judicial Proceedings Committee
The Honorable Thomas M. Middleton, Chairman
Members, Senate Finance Committee
The Honorable Michael Lenett

FROM: Joseph A. Schwartz, III
Pamela Metz Kasemeyer
J. Steven Wise

DATE: February 23, 2010

RE: **OPPOSE -** Senate Bill 187 – *Maryland False Claims Act*
OPPOSE – Senate Bill 279 – *Maryland False Health Claims Act of 2010*

The Maryland State Medical Society (MedChi), which represents over 7,300 Maryland physicians and their patients, opposes both Senate Bill 187 and Senate Bill 279.

Senate Bill 279 creates civil statutory remedies with respect to "False Health Claims" and essentially replicates the Federal qui tam statutes. Senate Bill 187 is applicable to all "false claims" and again is modeled on the federal qui tam law. Qui tam refers to the practice of allowing private "relators" to file lawsuits on behalf of the State with respect to "false claims." The State is then given an opportunity to "take over" the lawsuit or to allow it to proceed independently of state intervention.

While the proponents of Senate Bill 279 will say that the legislation is necessary so the state can be adequately compensated for "false health claims," MedChi submits that Senate Bill 279 is a fatally flawed mechanism which will result in extraordinarily expensive litigation against Maryland doctors and hospitals.

While there are many objections to Senate Bill 279 (for example, the bill is retroactive as the limitations period will allow the lawsuit to reach back 10-years retroactively to October 1, 2000, pg. 20, lines 6-15; damages would be quadrupled as opposed to tripled as in the federal law, pg. 9, lines 8-12), MedChi has two principal objectives to Senate Bill 279 and Senate Bill 187.

First, is the definition of "knowing" or "knowingly" with respect to the submission of a false health claim. This definition occurs at pg. 4, lines 18-25. This definition is critical because a doctor or hospital which has "knowingly" submitted a false health claim would be subject to the following **extraordinary remedies**: Quadrupled damages, a civil fine of not less than $5,000 per violation, an award of attorneys fees and costs. Since the "stakes" are so high, the evidentiary bar should be equally high. The current definition of "knowingly" in Senate Bill 279 does not require a specific intent to defraud, (pg. 4, line 19) and also incorporates an inane definition from the federal law at pg. 4, line 22 ("deliberate ignorance"). MedChi believes that if Senate Bill 279 is to go forward, this definition has to be corrected so it is consistent with the Maryland common law on fraud. In order to do so, the language on pg. 4, line 19, must be deleted ("and without requiring specific intent to defraud") and the "deliberate ignorance" language on pg. 4, lines 22 and 23 should be deleted. If these changes are made, the definition of "knowing" or "knowingly" will match up with the Maryland common law on fraud. See, analysis of statutory definition as compared with Maryland law of fraud, attached.

The second principal objection is to the qui tam lawsuit regime. MedChi has no difficulty with awarding a "whistleblower" a bonus for coming forward to report false claims. However, replicating the federal qui tam provisions in state court is problematic. Such lawsuits are inherently complicated because they involve three parties as opposed to the normal two parties. For example, almost 40% of the text of Senate Bill 279 addresses the relationship between the "relator" and the State (see pgs., 9-16, lines 21-22) Because of the Byzantine complexity of medical billing, MedChi has confidence that state authorities and state lawyers will make the correct judgments in bringing lawsuits; MedChi does not have the same confidence that private relators will do the same. The cost of defending such lawsuits is prohibitive and doctors rarely, if ever, can be reimbursed even if they win. See, AMA article on doctor's unsuccessful attempt to recoup $1,000,000 in attorney fees, attached.

MedChi believes that Senate Bill 279 should be amended to allow the state to bring a case for false health claims and would support making the remedies for such false health claims stringent (although it appears that the proposed remedies in Senate Bill 279 are quite extreme, particularly the civil fine level of $5,000 to $10,000 per violation).

However, these "remedies" should only be available when the state proves that a hospital or doctor or other provider has had a "specific intent to defraud" the state in submitting such claims.

For more information call:
Joseph A. Schwartz, III
Pamela Metz Kasemeyer
J. Steven Wise
410-269-1618

cc: Carolyn A. Quattrocki, Esq., Governor's Legislative Office

- **Common Law Fraud**

  - In order to recover damages in an action for fraud or deceit, a plaintiff must prove:
    1. That the defendant made a false representation to the plaintiff;
    2. That its **falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth**;
    3. That the misrepresentation was **made for the purpose of defrauding** the plaintiff;
    4. That the plaintiff relied on the misrepresentation and had the right to rely on it; and
    5. That the plaintiff suffered compensable injury resulting from the misrepresentation.

  See Ellerin v. Fairfax Savings, F.S.B, 337 Md. 216, 652 A.2d 1117 (1995).

  - "Recovery in a tort action for fraud or deceit in Maryland is based upon a defendant's *deliberate intent to deceive*." Ellerin at 230.
  - "The general rule undoubtedly is that in action for deceit there must be knowledge of the falsity, by the party making the representation, *and hence scienter must be expressly alleged and proven*…" Ellerin at 230.
  - "Misjudgment, however gross, or want of caution, however marked, is not fraud." Ellerin at 230.

- **Senate Bill 279/2010**

  - Premises violations of the Act upon "knowingly" taking certain actions (*see* pp. 7-8).
  - "Knowingly" is defined as follows:
    - "Knowing or Knowingly means, with respect to information and *without requiring specific intent to defraud*, that a person:
      1. Has actual knowledge of the information;
      2. Acts in deliberate ignorance of the truth or falsity of the information; or
      3. Acts in reckless disregard of the truth or falsity of the information."

- **Differences as to Intent**

  - HB 279 differs from MD common law with respect to intent in several respects:
    - The bill does not require "specific intent to defraud";
    - The bill requires only that a person have "actual knowledge of the information", not that they know of *the falsity of* the information; and
    - The bill also defines "knowing" to include "deliberate ignorance…".
  - The bill *does* track the common law by defining "knowingly" to include acting in "reckless disregard" of the truth. *See* Ellerin at 231.

PROFESSION

Fraud charges dropped, but doctor can't recoup costs

In the Courts. By Amy Lynn Sorrel, amednews staff. *Posted Feb. 1, 2010.*

IN THE COURTS
Analyzing the impact of recent court decisions on physicians
SEE ARCHIVES

They say you can't fight city hall. A recent federal appeals court ruling shows just how difficult it is for physicians to take the government to task.

In a Jan. 8 decision, the 9th U.S. Circuit Court of Appeals overturned a rare award to a physician for legal fees he spent defending himself in what turned out to be a failed health care fraud prosecution. Nevada otorhinolaryngologist Mark Capener, MD, denied any wrongdoing, and a jury in 2006 acquitted him of criminal fraud charges after a trial judge dismissed most of the claims.

Although appellate judges agreed that Nevada prosecutors committed several mistakes throughout their investigation, the court said the errors did not rise to the level of misconduct that warranted any recompense.

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Dr. Capener's attorney and the U.S. Attorney's Office for the District of Nevada declined to comment.

The investigation into Dr. Capener's billing practices began when a health insurance company reported to the state what it believed were patterns of excessive sinus surgeries, according to court records. During the probe, the government consulted with a physician expert who reviewed Dr. Capener's patient files, pathology reports and computed tomography scans, and concluded that many of the procedures were either unnecessary or never performed.

A grand jury indicted Dr. Capener in 2005. At trial, the government's main argument centered on testimony from its expert that the surgeries in question would require breaking bones, yet no bone fragments appeared in the pathology reports. The expert concluded, therefore, that Dr. Capener did not perform the surgeries. Nor could he have completed them in the short time frames reported in his claims, the government argued in legal documents.

Fighting back

But Dr. Capener fired back with evidence contradicting the government's claims.

His expert witnesses -- including the pathologist who processed the patient samples -- revealed that bone fragments were clearly visible in most, if not all, of the slides, according to court records.

Although the presence of bone fragments may not have been documented separately in each pathology report, it was often accounted for in other references to sinonasal mucosa, which was not atypical, the experts testified.

Dr. Capener also produced videos showing him quickly performing the surgeries that the government claimed were unlikely, as well as other documentation disputing charges of upcoding claims.

The U.S. District Court for the District of Nevada ultimately dismissed half of the 52 criminal health care fraud charges levied against Dr. Capener. A jury cleared him of the remaining counts.

After the verdict, Dr. Capener sued the government in 2007 for the $1.4 million it cost to fight what he claimed was a frivolous case. He sued under the federal Hyde Amendment, which allows defendants in criminal cases to recover legal expenses when the government pursues a case that is "vexatious, frivolous or in bad faith."

Dr. Capener argued that prosecutors should have done a more thorough investigation of the pathology samples to discover the bone fragments and of the insurance company's records to verify his patients' medical histories and supporting evidence of their need for the surgeries.

The district court agreed, in a 2007 order granting Dr. Capener $279,000 in partial relief. While the court did not find that the government had acted out of ill will, it did conclude that prosecutors pursued frivolous fraud claims regarding the purported lack of bone fragments.

"Either the government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether [its expert's] contentions regarding lack of bone fragments was in fact accurate," the court said.

But the brief win was met with swift defeat in the 9th Circuit, after an appeal by Nevada prosecutors. They argued to appellate judges that the lower court was wrong to consider the case's merits piecemeal -- rather than viewing it as a whole -- to determine if an award was justified.

Although the appeals court did not directly take up the issue, it found that the district court's conclusion was "clearly erroneous."

Appellate judges acknowledged that the government fell short in probing the pathology samples, calling the misstep "a regrettable mistake -- a clear failure by the prosecution to do its homework." Nevertheless, "the district court's finding that it was misconduct of the sort that could justify a fee award, however, goes too far," the 9th Circuit opinion states. "The Hyde Amendment [is] targeted at prosecutorial misconduct, not prosecutorial mistake."

The court recognized that it is not necessary to prove all three elements of the Hyde test -- that a claim is vexatious, frivolous and in bad faith -- and that in limited circumstances, a lack of investigation can constitute frivolousness. But the government had no reason to believe its theory was false and did its best to pursue a complex case with the expert information it had gathered, judges said.

"Reliance on an expert may well be faulty judgment in a given instance," the court said. But it generally would not constitute misconduct unless prosecutors knowingly depended on mistaken information.

In this case, however, the government interviewed the pathologist who took the samples, and prosecutors' main expert -- while reviewing only the medical and pathology records -- did not point to any need for further investigation of the related slides, the court noted.

As for ignoring the insurance company's files, "in an ideal world, perhaps, the prosecutors would have tracked down these records," the court said. "However, their failure to do so was, at worst, negligence. Mere negligence cannot form the basis of an award under the Hyde Amendment."

Legal observers say the case raises several caution flags for physicians, particularly in a health care environment in which the government is stepping up its anti-fraud efforts.

"Here the government brought a criminal action, saying these procedures are not medically necessary, which often comes down to a difference of opinion, and unfortunately that's becoming a criminal action," said Nashville, Tenn., attorney Brian D. Roark, who defends physicians in health care fraud matters.

Reversal not a surprise

The 9th Circuit's reversal came as no surprise because frivolous claims are difficult to prove, he said, and the ruling serves as a grave reminder that physicians have little recourse against the government.

"The hope is, if the government is going to pursue something criminally, it only does so after careful consideration because the risk to the defendant is so great," said Roark, of Bass, Berry & Sims, adding that physicians face anything from fines to jail time to exclusion from federal health care programs.

"Generally, the physician has no option other than to try and settle and work it out. ... So at the first sign of any government inquiry, the physician needs to move quickly to resolve it, and the government is always willing to have a back-and-forth."

Physicians would be remiss to expect the government not to make mistakes, said William B. Mateja, a former Justice Dept. special counsel for health care fraud. But the high bar for recovery is there to encourage the government to take on difficult cases.

"You don't want to hamstring prosecutors from taking hard cases and have them looking over their shoulders for Hyde claims," said Mateja, a partner at Fish & Richardson PC in Dallas who defends clients in health care fraud matters. "So [Hyde claims] are confined to cases where there is wanton behavior" -- for example, if the government pursued a case despite knowledge of a grudge a whistle-blower had against a defendant.

In addition, grand juries can serve as a check on prosecutors, who cannot win an indictment without first proving probable cause of criminal violations.

"The administration is really focused on the fact that, if we are going to solve the health care problem, one piece of the puzzle is clamping down on fraud and abuse," Mateja said. "But it's important to take heed of the fact the government is not perfect."

Sorrel *is a staff writer covering legal issues. She can be reached at 312-464-5138 or by e-mail (amylynn.sorrel@ama-assn.org).*

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