PLUNKETT & COONEY
Professional Corporation
Attorneys and Counsellors at Law
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
Fax (248) 901-4040
www.plunkettcooney.com

Attorney General Launches Regulatory Enforcement Sweep Targeting Healthcare Providers

By Marta J. Hoffman

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The Michigan Attorney General's office has launched an aggressive regulatory enforcement effort targeting the healthcare industry, according to a briefing provided by state officials.

Michigan Attorney General Michael Cox's Chief Deputy and three senior members of his staff served notice of the stepped up enforcement effort to the legal community during a recent meeting of the State Bar of Michigan's Health Care Law Section, which was attended by the author, who currently chairs the section's Medical Legal Committee.

Medicaid fraud, false insurance claims, licensing issues, abuse and neglect of seniors, drug pricing and compliance with certificate of need standards are among the areas upon which the attorney general is focusing. The State has allocated additional resources to the department, including nine new Health Care Fraud Division staffers, to assist with the increased enforcement activity.

The Attorney General received 22 Qui Tam cases last year as a result of legislation that went into effect in January. This legislation allows a person to file a civil action in the name of the State to recover a percentage of revenue lost as a result of Medicaid fraud. The amount of a whistleblower's recovery depends on whether the Attorney General intervenes. Even more Qui Tam cases are expected this year. It is important to note that, with respect to Medicaid fraud claims, the Office of the Inspector General recently determined, in consultation with the United States Attorney General, that Michigan's Qui Tam law does not meet the requirements of the Deficit Reduction Act of 2005, which would have allowed the State to share in a greater percentage of any recovery obtained pursuant to the State False Claims Act. Michigan's law does not contain language specific enough to establish a cause of action for fraudulent or false claims as described in the Federal False Claims Act (FCA) and does not contain language establishing a civil penalty of at least that amount authorized by the FCA. The State can resubmit its Medicaid False Claims Act for approval if it is amended.

During the State Bar meeting, Howard Marderosian, Chief of the Licensing and Regulatory Division of the Attorney's General Office, spoke on behalf of his division which represents the Department of Community Health and Bureau of Health Professions, which also includes the Board of Medicine, the Board of Osteopathic Medicine and other health professional licensing boards. His division handled 300 disciplinary actions and conducted 250 investigations last year.

Marderosian discussed the process for conducting investigations, which is statutorily mandated in cases involving a settlement, award or judgment in excess of $200,000, or when three or more settlements or awards have been obtained in a five-year period. These cases are reviewed by committees and consultants

and are then discussed with board members to determine which cases warrant further investigation and possible discipline.

The Health Professional Recovery Program (HPRP), a confidential program that assists and treats impaired health professionals, continues to enjoy great success. Enrollment in the program is confidential and remains privileged as long as impaired professionals abide by the terms of their contract with HPRP. Approximately 1,000 health professionals were under contract with HPRP last year and 14 percent of those were terminated for non-compliance.

Some health professionals faced licensing problems last year because of late renewals, because they failed to obtain and document requisite continuing medical education credits or because they fraudulently misrepresented the status of their CMEs. These deficiencies were discovered primarily during random checks by the State.

In addition, professional competency remains a concern. A bill was recently introduced in the State legislature to create a non-disciplinary program, similar to HPRP, for providers with competency issues.

Ronald Styka, Chief of the Community Health Division of the Attorney General's Office, serves as general counsel to the Department of Community Health and the Certificate of Need Commission. His department is concerned with the licensing of facilities and with certificate of need standards. He reported that the department took action against six hospitals operating open-heart surgery programs last year because they did not meet the certificate of need standards. Five have subsequently come back up to standard.

According to Styka, the department will be looking at transplant programs, air ambulance programs, NICUs, nursing homes and Alzheimer bed standards in 2007. A study is planned to determine whether additional Alzheimer beds are needed in nursing homes. In addition, the veracity of information provided on certificate of need applications will be increasingly scrutinized.

Styka added that the Attorney General's Office and the National Association of Attorney Generals would be collaborating on a program involving end of life issues and the use of pain medication.

Finally, Styka discussed a Senate Bill that had just been presented for signature to Michigan Gov. Jennifer Granholm. The legislation establishes new standards for the retention, maintenance and destruction of records by healthcare professionals and facilities. Licensure is dependent upon compliance and civil fines can also be assessed. The legislation requires that records be retained for seven years from the point of last contact with the patient, that certain procedures be followed when disposing of records and that records of healthcare providers who go out of business be maintained.

Wallace Hart, Chief of the Health Care Fraud Division, discussed his division's prosecution of individual and institutional healthcare providers for false claims and adult abuse and neglect in the long-term care setting. According to Hart, several thousand complaints were filed last year with only 200 cases opened.

Hart addressed the civil and criminal penalties that apply to healthcare fraud. He indicated that prosecutions are typically initiated for failing to provide the services billed, providing unnecessary services, upcoding, unbundling, and receiving kick-backs and bribes. Successful recoveries amounted to roughly five times the amount stolen, including one recent settlement totaling $52.5 million for alleged fraudulent billing practices for pharmaceutical services provided in the long-term care setting.

The Attorney General's Office is currently focusing on abuse and neglect in long-term care facilities. Fewer cases of physical abuse have been reported, however, theft against the elderly and infirm, as well

as general neglect resulting in illness are still quite prevalent. The department appears to be focusing on systemic institutional neglect (i.e., several patients neglected to the point of becoming malnourished), rather than isolated cases.

Individuals may be charged under the vulnerable adult abuse statute, statutes governing long-term care and for manslaughter when death occurs. Individuals, including nursing home administrators, medical directors, directors of nursing and lower level care givers can, and have been charged criminally in cases involving systemic neglect.

The Health Care Fraud Division is also currently involved in a project concerning criminal history checks. This project attempts to locate and prosecute people with a felony if they falsify applications for employment.

In addition to State enforcement actions, healthcare providers can expect to see increased enforcement activity by the federal government. During a recent fraud awareness symposium co-sponsored by Plunkett & Cooney, P.C., Charles Porucznik, Assistant Special Agent in Charge of the Detroit office of the Federal Bureau of Investigations, discussed his department's emphasis on similar enforcement activities.

While the defense of enforcement actions can be expensive, the consequences of an unsuccessful defense can be even more dire for healthcare providers. Fines, license suspension and/or revocation, negative press, business interruption and even imprisonment are among the possible outcomes of enforcement actions.

Healthcare providers should seriously consider implementing and/or updating policies to deter activity that could become the subject of an investigation and/or enforcement action by state or federal governments. Upon notice of an investigation or enforcement action, providers should immediately consult with legal counsel.

Questions and comments about this article may be directed to Marta Hoffman of the firm's Healthcare Industry Group by e-mail at mhoffman@plunkettcooney.com or at (313) 983-4720.