



## Real World Fraud Lessons for the Pharmacy Arena

by Jeffrey S. Baird, Esq.

In fraud and abuse land, there are several wise sayings that pharmacies need to follow. One is, "If your brain tells you one thing, and if your stomach tells you something else, ignore your brain and trust your stomach." Another is "If it looks like a duck, walks like a duck, and sounds like a duck ... then it is a duck."

Now let's switch gears and talk about human nature. If you leave \$10,000 in a brown paper sack on the side of the road, someone will pick it up. A tendency for some pharmacies is to promote products that are easy to provide and have high reimbursement. Doing so invites scrutiny. Third party payers will see that a particular code is being heavily billed and will clamp down on it.

Recently, the *Wall Street Journal* ran a front page article entitled "Probes Target Fraud in Military Health Plan." The article says, in part:

"Federal prosecutors in at least four states are mounting investigations into what they describe as widespread fraud by compounding pharmacies in claims to the health-insurance program that covers 9.5 million U.S. military members and their families. ... [F]our Florida pharmacies last month agreed to pay \$12.8 million combined to settle civil allegations that they falsely billed the insurance program [TRICARE] for expensive pharmaceutical creams and gels to treat pain, scars and other ailments. ... Two of the compounding pharmacies... employed salespeople who paid doctors to write prescriptions to [TRICARE] beneficiaries. .... In some cases, doctors would conduct telephone consultations with beneficiaries and then write them prescriptions, despite having not met with the beneficiaries in person. .... Those prescriptions were illegitimate because they weren't based on genuine doctor-patient relationships, a violation of the federal False Claims Act, the prosecutors said. One of the pharmacies had paid commissions of up to 58 percent of the amount paid by [TRICARE] to marketers who promoted their drugs to physicians, prosecutors alleged .... The commissions amounted to improper kick-

### Probes Target Fraud In Military Health Plan

By JOSEPH WALKER

Federal prosecutors in at least four states are mounting investigations into what they describe as widespread fraud by compounding pharmacies in claims to the health-insurance program that covers 9.5 million U.S. military members and their families.

In the latest move, four Florida pharmacies last month agreed to pay \$12.8 million combined to settle civil allegations that they falsely billed the insurance program Tricare for expensive pharmaceutical creams and gels to treat pain, scars and other ailments, according to A. Lee Bentley III, the U.S. attorney for the Middle District of Florida.

Two of the compounding pharmacies, which make customized medicines by mixing pharmaceutical ingredients, employed salespeople who paid doctors to write prescriptions to

Tricare beneficiaries, prosecutors said. In some cases, doctors would conduct telephone consultations with beneficiaries and then write them prescriptions, despite having not met with the beneficiaries in person, prosecutors said. Those prescriptions were illegitimate because they weren't based on genuine doctor-patient relationships, a violation of the federal False Claims Act, the prosecutors said.

One of the pharmacies had paid commissions of up to 58% of the amount paid by Tricare to marketers who promoted their drugs to physicians, prosecutors alleged in settlement agreements. The commissions amounted to improper kickbacks in exchange for referring business to a government agency, the prosecutors said.

The pharmacies aren't admitting civil liability in the settlement agreements, according to copies of the agreements re-

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backs in exchange for referring business to a government agency. ... In many cases, pharmacies charged [TRICARE] between \$10,000 and \$40,000 for a one-month supply of compounded medication. .... [TRICARE] paid \$1.75 billion for compounded drugs during its 2015 fiscal year that ended in September—18 times the amount paid in 2012. ... Compounded drugs represented 19 percent of [TRICARE'S] estimated \$9.14 billion prescription drug budget in 2015, up

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from 1.3 percent in 2012. ... "I believe that the increase is due almost entirely to fraud," [U.S. Attorney for the Middle District of Florida A. Lee] Bentley said. .... [TRI-CARE] spending on compounded pain medicines began to skyrocket around 2012 as pharmacies, often working with independent marketing companies, aggressively marketed the drugs to doctors and patients.

There are several lessons that pharmacies can learn from the *Wall Street Journal* article. Pharmacies cannot pay commissions to 1099 independent contractor marketing reps that generate patients covered by a government health care program. Doing so violates the Medicare anti-kickback statute. On the other hand, the pharmacy can pay commissions to bona fide full-time or part-time W2 employees. Why? Because there is an exception to the anti-kickback statute that says that a pharmacy can do so.

If a pharmacy is billing the heck out of particular code (such as compounded pain cream), then the pharmacy will have a bullseye painted on it. A third party payer or a governmental agency (such as the OIG) will likely look at the pharmacy. And so if the pharmacy is billing the heck out of a code, its operations need to be pristine.

Health care is moving rapidly into telemedicine. This is a good thing. However, the pharmacy needs to be aware of state telemedicine laws. Most state telemedicine laws say that for a proper physician-patient encounter to take place, the physician and patient must have both an audio and a visual encounter. Visual can include Skype and Facetime.

Our law firm has the privilege of representing many pharmacies throughout the country. We saw pharmacies become intoxicated with the easy money resulting from billing for compounded pain creams. It was "funny money." We warned pharmacies about the dangers of what they were doing. But money—particularly easy money—is intoxicating. The lessons discussed in the *Wall Street Journal* article are critical for pharmacies to understand. ■

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