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The California Insurance Frauds Prevention Act: Recent developments regarding California's powerful commercial health insurance fraud statute

By Gabrielle Degelia, Esq., and Lindsey Fetzer, Esq., Bass, Berry & Sims PLC*

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We have previously discussed[1] the California Insurance Frauds Prevention Act (IFPA) — a state antifraud statute that, while modeled on the False Claims Act (FCA), is unique in targeting fraud in the *commercial* health insurance space.

The court noted that "insurance fraud is a specific intent crime; the defendant must specifically intend to defraud a person with a false or fraudulent claim."

At the time, IFPA actions had resulted in tens of millions of dollars in settlements, and we anticipated IFPA would remain a tool used by *qui tam* relators and the State of California in targeting alleged healthcare fraud moving forward.

The intervening years have indeed seen continued enforcement under IFPA:

- Essilor Laboratories of America agreed to a $23.8 million settlement related to allegations of providing up-front cash payments to eye care providers to funnel business to Essilor and use Essilor lenses and laboratory services.
- FVR Medical Group, Inc. and related entities agreed to pay $3.275 million related to allegations of submitting false claims that inflated the length of patient visits and represented telehealth visits as in-person, as well as prescribing FC2 female condoms that were not medically necessary.
- As recently as a few months ago, Concentra reported in its Form 10-K that it had received a subpoena from the California Department of Insurance relating to an investigation under IFPA.

A recent decision, however, has demonstrated one pathway to combat allegations of IFPA violations. In *California ex rel. Duncan v. Sutter Health et al.*,[2] a surgeon and his patient filed a *qui tam* action under IFPA, alleging that nine Sutter hospitals improperly billed for care in a more expensive recovery room than necessary.

The court explained that Phase I treatment takes place in Post-Anesthesia Care Units (PACU) rooms and consists of "high-intensity, high-acute" immediate postoperative care under the supervision of an anesthesiologist and registered nurses.

Once the patient's vital signs are normal and the patient is awake and alert enough to move to a less intense level of care, they enter Phase II treatment, in which the patient is still monitored for residual effects of anesthesia or other complications.

After authorization by an anesthesiologist, a patient in Phase II may be moved out of the PACU room to a "step-down" room in preparation for discharge. Relators alleged, however, that it was fraudulent for Sutter to bill Phase II care outside of the PACU room (in the step-down room) as a separate line item.

The trial court ultimately determined that it was not fraudulent to charge for Phase II care in a step-down room and that the Phase II care billed in the case was medically appropriate. Further, the court noted that "insurance fraud is a specific intent crime; the defendant must specifically intend to defraud a person with a false or fraudulent claim."[3]

The court found that Sutter did not have the intent to misrepresent the treatment provided, nor did it receive payment to which it was not actually entitled: "There was confusion about terminology and billing, but the services billed were provided and billable."

While IFPA remains a handy regulatory tool for the government, the *Sutter Health* decision demonstrates that these claims are not invincible. And, as the court notes, the IFPA is a specific intent statute. This is less permissive than the federal FCA scienter requirements, which we have written about before.[4]

Further, this risk is somewhat contained for national or multinational companies, as California and Illinois remain the only two states with *qui tam* provisions allowing claims for commercial insurance fraud.

Notes:

[1] https://bit.ly/3WapX1P

[2] *California ex rel. Duncan et al. v. Sutter Health et al.*, Case No. RG17846895 (Cal. Super. Ct. June 17, 2024).

[3] *Banerjee v. Superior Ct.*, 69 Cal. App. 5th 1093, 1103 (2021).

[4] https://bit.ly/3WtGLkT

About the author

Gabrielle Degelia (L), an associate at **Bass, Berry & Sims PLC,** conducts internal and government-facing investigations concerning white collar and corporate compliance matters, including alleged securities fraud and accounting fraud, as well as violations of the False Claims Act, Anti-Kickback Statute, Foreign Corrupt Practices Act, and other criminal and civil regulations. She can be reached at Gabrielle.Degelia@bassberry.com. Firm member **Lindsey Fetzer** (R) represents clients in government and internal investigations and litigation involving alleged violations of the FCA, AKS, FCPA, and other criminal and civil regulations. She works with health care plans, risk-bearing provider groups and vendors in litigation, investigation and compliance counseling matters. She can be reached at LFetzer@bassberry.com. The authors are based in Washington, D.C. This article was originally published June 27, 2024, on the firm's website. Republished with permission.

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