

Don't Abandon Hope, All Ye Who Enter Here: Thoughts on the Successful Defense of a Healthcare Fraud Prosecution

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I. INTRODUCTION

There's no doubt about it: combating healthcare fraud has become a politically charged issue, with politicians eager to propose and associate themselves with initiatives designed to stamp out healthcare fraud.

In Congress last spring, several Democratic senators and representatives introduced the Seniors Safety Act of 1999, which proposed, in part, measures making it easier for the federal government to prosecute healthcare fraud cases.¹ About the same time, Vice President Gore announced the administration's creation of a new national healthcare fraud and abuse task force and vowed to increase the government's efforts to prosecute healthcare fraud cases.² President Clinton recently used his weekly radio address to the nation to trumpet his administration's successes in combating healthcare fraud, telling the American people that "when it comes to prosecuting fraud and abuse, we're doing more than filing cases; we're also winning convictions."³

The statistics back up the administration's claims of increased activism in prosecuting healthcare fraud. In 1998 (the year in which the prosecution discussed in this *Analysis* was brought), the federal government filed 322

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criminal healthcare fraud cases, a 14% increase over the number of cases filed in 1997.⁴ In addition, 219 healthcare fraud convictions were obtained during 1998.⁵ Coupled with the explosive growth of the qui tam industry,⁶ there are sure to be many healthcare prosecutions in the future.

The increased attention paid to healthcare fraud has doubtless produced some valuable results. But the growing zeal for bringing criminal prosecutions against the healthcare community has led to the return of indictments in many cases that, in years past, would have been brought in the civil arena if pursued at all. As a result, more and more members of the healthcare industry – physicians, administrators, accountants, and lawyers – are finding themselves targets of criminal prosecutions.⁷

Faced with the big guns of a federal criminal prosecution – grand jury proceedings, felony indictment, and the threat of prison – most defendants in healthcare fraud cases surrender without a fight. When offered the opportunity to improve their situation by cooperating with the government, many find the enticement irresistible.

Rather than abandon all hope after receiving a target letter, those in the healthcare industry should know that it is possible not only to fight back but also to prevail in a criminal healthcare prosecution. What follows is an analysis of a recent trial in the Southern District of Illinois in which four former managers of Healthcare Service Corporation ("HCSC") or, as it is better known, "Blue Cross/Blue Shield of Illinois" were acquitted of every charge they faced, including conspiracy, mail fraud, wire fraud, obstruction of federal audits, and false statement charges.⁸ Four other Blue Cross managers pleaded guilty before trial, however, and are currently serving their sentences or awaiting sentencing. They may also be questioning the wisdom of their decisions to plead guilty.

II. BACKGROUND

HCSC took over Medicare Part B claims processing for Illinois in April 1984. For the next ten years, HCSC struggled to improve the quality of its claims processing and customer service while meeting the Health Care Financing Administration's ("HCFA") demands for reduced costs and great efficiency. By 1993, it seemed, HCSC had succeeded: the quality of its claims processing ranked among the top three carriers in the nation; it had achieved a 100% score on the annual Contractor Performance Evaluation Program; and it had reduced its bottom line unit cost ("BLUC"), the processing cost per claim on which its contract payments were based, in every year since 1990.

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In 1994, after HCFA had terminated the contract of Blue Cross of Michigan because of a variety of alleged irregularities, HCFA awarded the Michigan contract to HCSC, doubling the number of claims the company processed each day. After years of struggling to distinguish itself from the crowd of other Medicare contractors and would-be contractors, it seemed that HCSC was well positioned to become, in the words of its Vice President for Medicare Part B Operations, a "final player" in the Medicare contracting game.

Unknown to executives at Blue Cross, however, a supervisor working in HCSC's Medicare Part B division in Marion, Illinois, had filed a qui tam suit under seal alleging, among other things, that for years HCSC had been manipulating the performance data and quality reports it had submitted to the government. In spring 1995, the Department of Justice ("DOJ") and the Department of Health and Human Services ("DHHS") agreed to join the suit and began a joint investigation. The DOJ/DHHS investigation was not revealed to HCSC until late August 1995, when agents of the DHHS Office of Inspector General ("OIG") served the first of many subpoenas on the company.⁹

The OIG investigation and the qui tam suit continued for almost three years. Although documents produced by the government during discovery before the criminal trial revealed that DOJ and DHHS were apparently willing to settle the case early on for a reasonable sum, it was the qui tam relator's attorney who first urged the government to initiate a criminal prosecution and who took an active (if not lead) role in the investigation, interviewing witnesses, finding and reviewing documents, and conferring regularly with the government attorneys and agents. Ultimately, DOJ began a grand jury investigation, jointly run by prosecutors from the Health Care Fraud section of the Criminal Division in Washington and the U.S. Attorney's Office for the Southern District of Illinois.

In July 1998, the government announced that HCSC had agreed to plead guilty to conspiracy to obstruct federal audit, obstruction of a federal audit, and six false statement counts. The company agreed to pay a combined total of \$144 million in criminal penalties and settlement payments to resolve the civil qui tam suit (the relator received a payout of more than \$29 million, an award that will do nothing to slow the growth of the qui tam industry).¹⁰

Shortly thereafter, the other shoe dropped: the government announced that two managers of HCSC's claims processing operation had agreed to plead guilty to charges of conspiracy to defraud the government by manipulating

performance processing statistics and that five other managers had been indicted on conspiracy, mail and wire fraud, obstruction, and false statement charges.¹¹ HCSC's success, it seemed, had been a sham.

Four of the indicted managers, however, did not see it that way. Secure in their knowledge that, whatever improprieties other may have committed, they had done nothing wrong, these managers rejected the deals offered by the government, resolved to put the government to its proof at trial, and set about locating their own proof. The defendants moved successfully to delay the trial to allow them to review the warehouse full of documents HCSC had collected and archived during the course of the government's investigation and its own internal investigation and methodically spent thousands of hours reviewing the documents and interviewing witnesses over the next year. In the meantime, the government prosecutors confidently told the trial court that "this isn't a documents case" and indicated that they intended to rely primarily upon witness testimony at trial.

Trial began on September 13, 1999. The government called forty-two witnesses and took twelve weeks to present its case. In contrast, the four defendants called a total of ten witnesses and took less than a full day to present their cases. None of the defendants testified. After deliberating for only six hours, the jury acquitted each of the defendants on every charge.

III. LESSONS LEARNED AND RE-LEARNED

How did it happen? How did four mid-level managers prevail over a government prosecution that had yielded a criminal conviction, \$144 million dollars in fines and settlement payments, four guilty pleas from managers of the operation, and a trial in which the government presented almost three months' worth of evidence? Jury verdicts, of course, are difficult to decipher, and it is particularly dangerous to extrapolate from a sample of one, but the success of the defendants in the Blue Cross case may provide encouragement and ideas to members of the healthcare community who—in light of the government's increasing emphasis on combating healthcare fraud—may find themselves the targets of criminal investigations and defendants in criminal prosecutions. What follows is an attempt to identify factors that contributed to the success of the Blue Cross defendants at trial and to illustrate some of the lessons learned (or re-learned) along the way.

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A. Not Every Plea Is a Bargain

One of the government's strategies in a multiple defendant prosecution is to divide and conquer. Nothing divides defendants or potential defendants faster than the prospect of striking a sweetheart deal with the government. The Blue Cross case illustrates several points that defendants should keep in mind when considering such deals and that attorneys should keep in mind when examining witnesses who have received them.

First and foremost, any target or defendant contemplating a plea with the government must recognize that the fundamental prerequisite to pleading guilty is actual guilt. That proposition seems obvious, but most people facing healthcare fraud charges have never been incarcerated and have no prior criminal history. Their goal is, and should be, to avoid jail. If the government offers a plea bargain that removes (or appears to remove) the risk of going to jail, some will find the offer irresistible even if they did not commit a crime.

In the Blue Cross case, for example, one of the managers pleaded guilty to obstruction of a federal audit pursuant to a plea agreement that offered the prospect of avoiding prison. Despite her guilty plea, she could not explain at trial what she had done to obstruct a federal audit. Apparently, she had entered the plea simply because the government had included that charge in the information she was required to accept to get the deal.¹² Similarly, another manager pleaded guilty to conspiracy based in part on acts he undertook without any intent to defraud the government.¹³ For some, pleading guilty to crimes they did not commit is a small price to pay to avoid years in prison.

Before a target or defendant succumbs to similar temptation, he or she should know that, under the federal sentencing guidelines, there is often little the government can or will offer to assure that a prison sentence can be avoided. The primary benefit the government can bestow is a downward departure motion for cooperation, but the policy in many districts is to limit the degree of such departure recommendations to one-third off of the otherwise applicable guideline range (usually taken from the low end of that range). With that limitation, any defendant with an offense level of eighteen or more (assuming a Criminal History category of I) is unlikely to receive a sentence that would not carry jail time. In a healthcare fraud case, it is rare to find a defendant whose offense level will be less than eighteen, given the number of adjustments that are likely to apply in such cases.¹⁴

In the Blue Cross case, our client faced the prospect of a guideline range that called for imprisonment of three to four years had he been convicted, high enough to require prison even with a one-third reduction. Government cooperation deals may therefore leave healthcare workers weighing whether a reduction in their sentence of about a year or so is worth foregoing the chance to vindicate themselves at trial and to escape prison altogether. When the government's plea bargain deal is viewed in that light, may will decide that trial makes more sense.

Moreover, even if the government offers a deal that provides the *prospect* of staying out of jail, the deal will offer no guarantees of that outcome. Such deals typically carry with them at least two significant caveats.

First, it is the judge, not the prosecutor who will sentence the defendant, and the judge is not bound to accept any recommendation by the government or to grant any departure motion by the government. If the judge is not convinced that the defendant has been truthful about his own conduct, as well as that of others, the judge may not sentence the defendant in accordance with the prevailing expectations of the parties. One way to mitigate that risk is through an agreement entered pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, which permits the parties to agree to a specific sentence; if the court does not agree to impose that sentence, the agreement is voided, and the parties are back to square one. Because some judges will not accept pleas entered pursuant to such agreements, check before going down that road.

Second, prosecutors typically condition their obligation to make a downward departure motion on their own subjective evaluation of whether the defendant has provided "complete cooperation" and has done "all things necessary" to assist the government.¹⁵ The trouble is that witnesses who plead and testify only to get a deal are often reluctant witnesses, and their testimony at trial may lead the government to question whether they have, in fact, provided "complete cooperation" and done "all things necessary" to assist the prosecution. In most cases, prosecutors have great discretion in deciding whether to make a downward departure motion for substantial assistance, and recalcitrance on the witness stand does not usually improve the prospects of earning such a motion.¹⁶

The Blue Cross trial bore this notion out because the prosecutors were forced to try to impeach many of the witnesses to whom they had offered plea agreements or informal immunity when those witnesses failed to provide expected testimony. Moreover, such witnesses provide a wonderful line of cross-examination. If a witness is willing to plead guilty

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to a crime that the witness did not commit, it will not be difficult for the jurors to believe that the witness would falsely implicate others, as well.

Before racing to the prosecutor's office to plead, targets and defendants should also recognize that prosecutorial deadlines for plea negotiations are often quite arbitrary and elastic. In this regard, prosecutorial deals are often not very different from any other "limited time offer"; in many cases, the same (or even better) deal may present itself farther down the road. There are no guarantees, of course, but the Blue Cross case bears this notion out: one of the five defendants originally indicted in July 1998 received virtually the same plea bargain from the government two weeks before the trial that other pleaders had received fifteen months earlier.

Prosecutors recognize that, what with the complexity and the ambiguity of many of the issues, juror sympathy for many defendants in such cases (executives, doctors, and women, for example), and the nonviolent nature of the charges, many healthcare fraud cases do not have a great deal of jury appeal. As trial approaches, they may be looking for ways to cut their potential losses, strengthen their case as to other defendants, or both. In a case in which a defendant is uncertain about his or her prospects at trial or which involves a great deal of discovery work before trial, rebuffing initial government offers may give the defendant an opportunity to explore and develop his or her defense before deciding whether to go to trial. A more developed defense may also strengthen the defendant's hand in negotiations with the government.

Two more caveats: First, some judges impose their own deadlines on plea negotiations, and they are more likely than the government to enforce them. Always check to make sure that the judge to whom the case is assigned has no rule precluding acceptance of guilty pleas at any point before trial. Second, a delayed entry of a guilty plea can result in the loss of a point for "timely" acceptance of responsibility under Guideline § 3E1.1(b)(2), and the defendant should be aware of that risk. Many courts, however, will agree to award the extra point even when the plea occurs shortly before trial.¹⁷

B. Get out of the Gate Fast

The defendants in the Blue Cross case owe much of their success to the vigorous action taken by their employer when the company first became aware of the investigation. Almost immediately, HCSC started its own internal investigation. To increase the impartiality of the investigation and to avoid future disqualification of its regular attorneys in any litigation, HCSC hired a firm other than its regular outside counsel to conduct a

review of the charges and to sniff out any other problem areas in the Medicare Part B operation. By promptly starting its own investigation, HCSC was able to track the course of the government's investigation, identify quickly the potential problem areas, and collect evidence while memories were fresh and relatively untainted by fear of prosecution or loss of employment.

The company's diligence in this regard proved invaluable to the defendants at trial. Many of the witnesses called by the government had been interviewed by the company's special counsel before beginning the string of government interviews and grand jury appearances that usually precede trial testimony. As a result, many were forced to admit on cross-examination that much of their trial testimony had never been mentioned to the investigators for the company and had been related for the first time to the government years later after the witnesses had received various forms of immunity from the government.¹⁸ It helped, too, that the interviews conducted by company counsel were thorough, often lengthy sessions. The depth of the interview sessions made the curious fact that the witnesses' memories seemed to improve with age all the more improbable.

Another caveat, however, is in order. Although some individuals may benefit from an aggressive investigation by their employer, it would be a mistake for any individual employee who has reason to believe that he or she may be a subject or a target of the government's investigation to rely on special counsel hired by the company to represent his or her individual interests. The loyalty of counsel hired by the company necessarily runs to the company, not to the individual employees, and at some point, the interests of the company and of the individual employees may diverge — as the Blue Cross employees who were asked to resign in the wake of the company's investigation discovered. Any employee concerned about personal civil or criminal liability should retain his or her own counsel as early as possible and before making statements to anyone, even counsel for the employer. One way to avoid the resultant stalemate: consider a joint defense agreement with the company so that company counsel can conduct the interview under privilege, but cannot waive the privilege unilaterally.

C. We're Better Together

A third lesson illustrated by the successful defenses in the Blue Cross case, one not unique to the defense of healthcare fraud prosecutions, is that the best defense is a joint defense, and the earlier it is established, the better. By the term "joint defense", we are not necessarily referring to a formal joint defense agreement in which the parties agree to various restrictions on their ability to disclose information obtained from the other

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parties to the agreement; rather, we mean simply that there must be as much cooperation as possible between attorneys in a multiple defendant (or target) context, whether or not there is a direct exchange of information between clients and attorneys representing other defendants.¹⁹

Cooperation among defense counsel offers many significant benefits, such as more efficient and thorough pretrial investigation and a division of labor during the course of the trial itself. But the most important benefit of a joint defense is the elimination of antagonistic defenses. Even if the cooperation between defendants and their attorneys consists of nothing more than an agreement to forswear finger pointing, every client will benefit immeasurably. Prosecutors like nothing better than to listen to one lawyer in a multiple defendant case explain in an opening statement that the government's evidence will show that it was all the other person's fault. Blaming the other defendant(s) is a sure-fire recipe for a government victory.

In the Blue Cross case, there was an extraordinary level of cooperation among the attorneys, and it was critical to the success of all of the defendants at trial. Each of the defendants and their attorneys recognized the importance of presenting a united front. Each of the defendants came from roughly the same mold. Each had worked with the other defendants for years. Each was familiar with the areas of the operation that were at issue in the trial. Each was among the most senior management personnel at the claims processing facility. Facing charges of a criminal conspiracy that extended for more than twelve years, each attorney for each of the defendants understood that finger pointing among these similarly situated defendants would only provide support and credibility for all of the government's evidence, including the portion that was directed at his or her own client.

Avoiding antagonistic defenses does not necessarily require abandonment of any defense that is unique to a particular defendant or adoption of only defenses that are common to the entire group of defendants. Indeed, a defense that is choreographed too well could subtly reinforce the notion that the defendants had conspired together.

In the Blue Cross case, each of the defendants had defense themes that were unique; those themes, however, were pursued in a manner that did not shift blame to other defendants. Our client, for example, spent a number of years during the alleged conspiracy working on special projects that were not directly related to HCSC's claims processing operations. We emphasized these facts, but in a manner that did not implicate other

defendants. It is one thing to tell the jury that one defendant's action demonstrate that defendant's innocence; it is another to contrast one defendant's actions to those of the other defendants. Few defendants can afford to pursue such a glass house defense in a multiple defendant trial.

D. It Ain't the 10 Commandments

Criminal intent is the principal disputed element in many healthcare fraud cases. Often, the physical acts are not in dispute at all; the case boils down to a question of whether they were performed in good faith or with an intent to defraud the government. In the Blue Cross case, many of the acts on which the government focused clearly occurred; where the defense and government parted ways was in the debate over whether what occurred had been performed with criminal intent. Here, the complexity and the ambiguity of the healthcare regulations will often prove helpful to defendants. By taking every opportunity to demonstrate how confusing, inconsistent, vague, and arbitrary many of the regulations governing Medicare claims processing are, defendants may be able to undermine the government's arguments about intent and to diminish the government's sanctimony. By the close of the Blue Cross trial, we believe the jury clearly agreed with one of the fundamental themes of our defense: "Medicare regulations ain't the 10 Commandments."

1. The Tax Code Pales in Comparison

The sheer volume of Medicare regulations and the frequency with which they are revised provide an excellent opportunity to show the jury that a defendant's actions were the product of confusion or a reasonable alternative interpretation of existing guidelines, rather than a criminal intent to deceive the government. As one of our colleagues pointed out at trial, the size and complexity of the tax code pales in comparison.

At trial, we illustrated this point by demonstrating that the prosecution, assisted by HCFA itself, had been unable to assemble an accurate set of the regulations at issue in our case. As the government's first witness, a HCFA administrator, candidly acknowledged, the set of regulations assembled for use at trial was "confusing" and "incomplete."²⁰ If Medicare claims processing regulations are so confusing that they cannot be mastered even by HCFA or the staff of a Medicare claims processor, jurors may show leniency when evaluating the intent behind the actions of, say, a small physicians' group charged with billing irregularities.

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2. Exploit Differences of Opinion Among Government Officials

With any luck, you won't have to rely only on your client's experience or your own creativity in demonstrating the ambiguity and the inconsistency in government regulations; the government may do it for you. In our case, a review of communications between Blue Cross and HCFA revealed differing interpretations of many regulations and guidelines even within HCFA.

For example, we found an internal HCFA communication in which personnel from the national office chastised staff in the regional offices for "gaming" the contractor evaluation system by allowing contractors to substitute nonerror cases for error cases for error cases in the samples reviewed by HCFA auditors. Because one of the principal allegations of the indictment was that the defendants had substituted nonerror cases for error cases in samples submitted to HCFA, the fact that even within HCFA there were different views about the propriety of that practice undermined the efforts of the prosecution to characterize the practice as criminal.

3. Exploit About-Faces by the Government

Changes in policy and procedures by the government can be exploited in the same way. The fact that HCFA had changed the elements and emphasis of the contractor performance evaluation scoring system almost every year and had then scrapped the system altogether let us argue that mistakes were just as likely to be innocent by-products of changes in the governing regulations as they were deliberate intent to defraud. Just as important, by scrapping the very system our defendants had been charged with cheating, the government sent the same message to the jury that we were sending: the Medicare regulations governing contractor performance evaluations were not carved in stone and did not embody some higher law. They were an arbitrary bureaucratic creation that had already been consigned to the trash heap. A jury will be reluctant to convict defendants charged with violating regulations and procedures that have already been superseded.

4. Exploit Absurdity

As one may imagine, the regulations governing the Medicare system offer abundant examples of bureaucracy run amuck, including absurd rules that are comical to all but those on trial for violating them. By pointing out some of these absurdities, we were able again to reinforce the message that the defendants had not acted with criminal intent.

Part of the government's prosecution in the Blue Cross case was based on allegations that various personnel had altered (after the fact) correspondence to beneficiaries so that it would comply with regulations designed to ensure that such correspondence clearly communicated the actions taken on their claims. In theory, such regulations were a good idea; in practice, however, they produced absurd results. Under the regulations, for example, HCFA auditors had to count up the number of words in the letter with three or more syllables and then apply a convoluted formula designed to reveal whether the letter was simple enough to be understood by the average beneficiary. The government therefore assessed errors when letters to beneficiaries regarding health insurance claims used too many three syllable words, such as "hos-pi-tal," "sur-ge-ry," and "me-di-cal."²¹ After the jury learned just what the regulations required, whether anyone ever changed letters to eliminate these big, hard-to-understand words was beside the point; the larger question in their minds was very likely, "Who cares?"

E. Confusion Through Diffusion

Many healthcare cases provide ways in which defendants can exploit prosecutorial tendencies to craft conspiracy and fraud charges as broadly as possible and to include as many different types of substantive charges as possible in their indictments. These tendencies are particularly prevalent in healthcare fraud cases in which the subject matter has been made a high political priority, in which a variety of law enforcement agencies and other interests are likely to be involved in the investigation, and in which the subject matter is often complex. Moreover, in healthcare cases, individual transactions do not typically involve sums sufficiently large to generate high sentences under the Sentencing Guidelines, prompting prosecutors to favor charges that permit the aggregation of the dollars involved in repeated transactions over time, such as conspiracy and mail or wire fraud. Although a defendant faced with a brace of charges covering many different statutes and spanning many years may have a hard time seeing it, the tendency of prosecutors to "overcharge" in this fashion affords defendants real opportunities and advantages at trial.

1. Introduce Positive Acts

Conspiracy has been called the "darling of the modern prosecutor's nursery,"²² but broad conspiracy charges give defendants a greater opportunity at trial to introduce so-called "positive acts" evidence (as contrasted to "bad acts" evidence) to rebut the government's allegations that the defendants had acted with criminal intent.

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Under Rule 404(a), a defendant is permitted to introduce evidence of a pertinent trait of character, such as honesty or integrity. And Rule 404(b) permits the introduction of other acts committed by a defendant as long as they are relevant to prove something other than the defendant's character. Although evidence under Rule 404(b) is usually introduced by the prosecution, there is nothing in the rule that precludes defendants from offering 404(b) evidence, as well. Thus, one could expect a defendant charged with submitting a false claim to Medicare to be permitted to point to all the accurate claims that he had submitted to establish his character for honesty and integrity pursuant to Rule 404(a) and to demonstrate his lack of criminal intent on the occasion for which he has been indicted. Nevertheless, courts routinely reject such efforts, reasoning that "[p]roof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment."²³

When the government expands a false claim charge into a conspiracy or fraudulent scheme charge, however, it provides an opening to the defendant to introduce the evidence of all the claims that were handled correctly. Those charges expand the period in which the defendant allegedly operated with criminal intent, making the other actions taken within that period relevant. Thus, positive act evidence that would not normally be admissible can be admitted when the government has charged an ongoing conspiracy or scheme to defraud.

In *United States v. Shavin*, 287 F.2d 647, 653 (7th Cir. 1961), for example, the court reversed a defendant's conviction for mail fraud based on the submission of false medical bills to insurance companies because the trial court had refused to permit the defendant to introduce evidence that he had submitted thousands of claims in which the bills were not false to prove good faith and lack of intent to defraud. The appeals court explained,

Ordinarily, evidence of other transactions not connected with the one in question is not admissible to establish or disprove the fraud upon which an action for damages is predicated. But here we have a different issue. It was competent . . . for both parties to "show every part and parcel of such business, or the method of conducting it, calculated to shed light upon the intent and purpose of its managers."²⁴

Thus, in the Blue Cross case, defense counsel were able to rebut the allegations that the defendants had conspired to provide false performance information to the government during a span of twelve years by introducing evidence of the myriad occasions in which the defendants had

gone out of their way to do just the opposite. It was only because the government had chosen to charge such a broad conspiracy, for example, that we were able to introduce the evidence that our client had once led his staff on an excursion to the local dump in a successful effort to retrieve Medicare claims that had been inadvertently thrown away by a staff member. The image of a man willing to wade through a garbage dump in search of lost claims was fundamentally at odds with that of a man involved in a conspiracy to defraud the government about the processing of those very claims and doubtless contributed to the jury's conclusion that our client was not a member of any such conspiracy.

Yet another caveat: Be aware that, in some cases, the government itself may wish to introduce evidence of occasions when a defendant has scrupulously followed the letter of the law—to negate, for example, a defense that the defendant did not understand the applicable rule or regulation.

2. Defuse Acts Committed by Others

Broad conspiracy and fraud charges also allow the government to introduce evidence of the conduct of others under an agency theory. This practice can also be used to the advantage of the defense. The government's efforts to include defendants not involved directly in the specific acts alleged in a conspiracy charge can also result, as in the Blue Cross case, in a curious trial in which much of the government's evidence pertains to acts that other people have committed and about which there is little dispute. When only a small percentage of the evidence offered by the government during a lengthy trial relates directly to the defendants on trial, the defendants have a convincing argument that the government's reliance on evidence of the acts of others reveals the weakness of the government's case as to the defendants on trial.

3. Put the Defense Case in Early

Broad indictments also give the defense a better chance to put their own cases before the jury sooner, rather than later. In general, the defense case must follow the government's case, and the rules and customs governing the scope of cross-examination and the presentation of evidence typically limit the opportunities for defendants to put their own theories and evidence before the jury during the government's case.²⁵ When the government includes broad conspiracy and fraud charges, however, they give defendants a real opening to start putting their case before the jury much earlier in the process.

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It is, for example, difficult for the government to object to the scope of cross-examination when the indictment charges a conspiracy spanning more than twelve years and they have led a witness through her experiences while employed at a company for that entire period of time. And when the government case promises to extend for weeks or months, many judges will be much more permissive as to the ground they will permit defendants to cover on cross-examination, particularly when the defense represents that it would otherwise have to call the same witness in its own case. In such a case, judges are likely to agree that allowing the defendants latitude to present their own points and exhibits during the government's case will minimize the inconvenience to witnesses who might otherwise have to be called back weeks or months later in the defense case. Moreover, that approach will make the overall presentation of the evidence more comprehensible to the jury, an argument that should have particular resonance in healthcare fraud prosecutions.

4. Develop the Conspiracy Alibi

Broad conspiracy charges also can provide an opportunity to develop a type of "alibi" defense. A conspiracy is an agreement to commit a crime, and the notion of an alibi defense to such a charge is, on one level, nonsensical—one need not be present at any particular location to make an agreement. When the government charges a conspiracy that spans a long period of time, however, it provides an opportunity to poke holes in the concept of concerted action, from which the inference of a conspiratorial agreement is typically drawn.

In the Blue Cross case, several defendants were able to show that they were reassigned to duties unrelated to the charges in the case for long periods of time; two of the defendants had spent several years during the alleged conspiracy running different Blue Cross facilities about which the government had raised no allegations. The combination of their physical absences from the locus of most of the activity at issue in the case, coupled with the absence of allegations emanating from the separate areas they had managed, contributed to the jury's conclusion that those defendants had not joined an ongoing conspiracy to defraud the government about Blue Cross's performance as a Medicare contractor. Had the government charged a more narrow conspiracy or focused on more specific conduct, those arguments would not have been available to the defense.

5. Highlight the Involvement of Multiple Agencies

Perhaps more than any other type of criminal investigation, healthcare fraud cases can involve many different law enforcement agencies. The

Office of Inspector General of DHHS has the most obvious mandate to pursue such investigations, but the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Agency, the Food and Drug Administration, the Postal Inspection Service, and other agencies will also frequently be involved. Although on first blush, the involvement of multiple agencies could be cause for pessimism and concern on the part of defendants, there are also positives that must be considered.

First, the involvement of many agencies is likely to exacerbate the government's tendency to craft a broader indictment than necessary. Federal law enforcement agencies often have particular statutes within their purview, and their involvement requires an informal commitment to include such charges in any indictment. A prosecutor who fails to include a mail fraud charge when drafting an indictment following an investigation in which the Postal Inspection Service has participated is unlikely to receive further assistance from that agency in the future. In addition, the need to accommodate the interests of all of the agencies involved in a prosecution will sometimes result in the inclusion of charges that do not fit the facts very well or that are extremely technical in nature. To the extent that such a result occurs, the defendants may use the presence of such charges to undermine the credibility of the entire prosecution.

Perhaps most significantly, the participation of multiple agencies can effectively increase the government's burden of proof. Simply put, the more agencies involved in the investigation, the more the jury is likely to expect from the government in the way of evidence. For that reason, we had no objection to the presence at counsel table during trial of OIG, FBI, and Postal Service agents; their presence made our arguments about the inadequacy of the government's investigation much more credible.

F. Defeat Guilt by Association

In the Blue Cross case, the jury heard from four managers who had pleaded guilty to participating in the very scheme the defendants were charged with conducting. In addition, although we had moved successfully *in limine* to exclude evidence that the company itself had pleaded guilty to charges of defrauding the government, we believed that it was very likely, given the amount of publicity the company's guilty plea had received before trial, that the jurors knew or would become aware of that fact as the trial progressed. In fact, however, the jury's acquittal of each of the defendants should convince the most pessimistic or cynical observers that juries can and will differentiate among individuals and judge the merits of the case against each defendant rather than assuming

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that the defendants on trial must be guilty simply because others had admitted that they were guilty.

Indeed, depending upon the degree to which the testimony of cooperating witnesses implicates a defendant, the fact that others have pleaded guilty can be used to advantage. Presumptions of innocence and jury instructions notwithstanding, jurors are likely to conclude that there is something to the government's charges; three-year investigations and multiple guilty pleas compel that conclusion, and any argument that nothing untoward happened is likely to fail (and to raise questions about the credibility of any party asserting it).

In our case, the cooperating managers each admitted to various acts of wrongdoing on their own, but none directly implicated any of the defendants on trial; their testimony was generally limited to statements about the defendants' knowledge concerning the crimes they and others had committed. That fact enabled us to acknowledge that wrongs had been committed while distancing our clients from that wrongdoing. That type of finger pointing (as opposed to that which often occurs between the defendants on trial) is not self-destructive and serves to explain why the defendants, unlike the pleaders, have not succumbed to the deals offered by the government.

G. Dive into the Documents

Given the complexity and the ambiguity of many of the issues in healthcare fraud prosecutions, it is imperative that you leave no stone unturned in your search of documents. That advice applies in any case, of course, but by their very nature, most healthcare fraud prosecutions involve a great deal of paper, particularly when, as in the Blue Cross case, the charges cover a lengthy time span. The volume of paper can be daunting (in our case, about 1,500 boxes containing more than 2 million pages of material), but a thorough review of those documents provides a great opportunity to gain the upper hand on the government, which is unlikely to have done as thorough a review.

Contrary to popular belief, prosecutors and agents do not have unlimited resources to throw at most cases, even when multiple agencies are involved in the prosecution. Faced with a warehouse of 1,500 boxes, most prosecutors and agents will review only a small portion of the most promising boxes in hopes of finding incriminating materials. Moreover, they will not review even those boxes with an eye to discovering documents helpful to the defense and are not, in any event, in a position to recognize many of the documents that defendants would regard as useful.

Aside from the substance of the documents you may find, the production of a significant number of documents by the defense buttresses defense arguments about the inadequacy of the government's investigation and the quality of its evidence. In the Blue Cross case, for example, defense counsel found documents that showed that the defendants had not routinely received incriminating reports from one of the managers who had pleaded guilty. That discovery not only helped us rebut the manager, who had testified that the reports had gone to all of the defendants on a regular basis, but also helped us challenge the integrity of the government's entire investigation. When confronted with the documents found by the defense, the manager expressed his frustration that the government had not provided him the documents to review before his testimony. He explained that, faced with 1,500 boxes of documents, he and the agents working with him "gave up" their search for the documents after several hours. As helpful as the documents were substantively, they proved far more helpful by buttressing the defense arguments that the government "gave up" before it found sufficient evidence to convict the defendants.

IV. CONCLUSION

Like our client in the Blue Cross case, many other members of the healthcare industry are likely to find themselves under investigation and indictment as the criminalization of healthcare reform continues. We hope that the outcome of the trial in the Blue Cross case, coupled with the observations offered in this Analysis, will encourage others faced with the daunting challenge of trial on healthcare related charges not to give up—at least not without seriously weighing their prospects at trial and not without knowing that trials in healthcare case as can be won.

ENDNOTES

- 1 *House and Senate to Unveil Senior Crime Legislation*, Sen. Patrick Leahy Press Release, 1999 WL 2224374 (May 19, 1999). Bills were introduced in the House and Senate; both have been referred to committee.
- 2 Press Release, Office of the Vice President, Mar. 25, 1999.
- 3 Clinton Radio Address to the Nation, Jan. 22, 2000.
- 4 1998 DHHS and DOJ Health Care Fraud and Abuse Control Prog. Ann. Rep.
- 5 *Id.*
- 6 There has been an explosion in the number of qui tam cases filed over the last fifteen years. Qui tam filings have increased by 1,300% since 1987. Michael A. Chagares, *Lucrative Explosion in Qui Tam Suits*, 8 N.J. Law.: Wkly Newspaper 1554 (1999). As a result of these qui tam actions, the federal government has recovered about \$2.5 billion, more than half of which was recovered after 1995. *Id.* Significantly, almost half of the \$2.5 billion in qui tam recoveries was attributable to healthcare fraud. *Id.*
- 7 In the first case of its kind, two transactional attorneys in Kansas were indicted in July 1998, along with hospital executives and doctors, for conspiring to violate anti-kickback laws. The government was widely criticized as being too aggressive in its fight against healthcare fraud and caused nationwide concern among healthcare fraud and caused nationwide concern among healthcare lawyers. *See, e.g.*, Peter Aronson, *Out of the Soup: "Anything Can Happen to Anybody," Says a Health Care Lawyer Charged in a Case That Arose From His Work*, Nov. 29, 1999, Nat'l L.J. A1, (col. 2); Peter Aronson, *Lawyers Go On Trial in Fraud Case: Health Care Contract Advice at Core of Prosecution's Case*, Feb. 1, 1999, Nat'l L.J. A01, (col. 1). The lawyers were ultimately acquitted in March 1999 upon their motions for acquittal at the close of the government's case. *United States v. Anderson*, No. 98-20030-JWL (D. Kan. Mar. 9, 1999), *see HLD*, v. 27, n. 4, at p. 38.
- 8 *United States v. Bartels*, No. 98-40070-JPG (S.D. Ill.).
- 9 As Paul Shaw and Robert Griffith pointed out in their November 1999 *Digest Analysis*, *see HLD*, v. 27, n. 11, at pp. 3-8, it is becoming increasingly common for federal law enforcement agencies to conduct criminal healthcare fraud investigations or at least the initial stages of investigations without ever contacting the target(s) of the investigation. This scenario is particularly true when the investigation results from allegations set forth in a qui tam suit, which must remain under seal for at least sixty days. 31 U.S.C.A. §3730(2) (West 1999).
- 10 Robert Pear, *Medicare Contractor Admits Longtime Pattern of Fraud*, N.Y. Times, July 17, 1998, at A10.
- 11 One of the five indicted managers pleaded guilty shortly before trial. Another manager was charged in a separate information several months after the original indictments had been announced and pleaded guilty at the time the information was filed.
- 12 Colleague Bill Lucco of Belleville, Illinois, cross-examined this witness to great effect:
 - Q. Do you recall what, if anything, was significant to you about October 24th, 1994?
 - A. Not by date, no.
 - Q. October 1994?
 - A. Was it the Michigan contract?
 - Q. Okay. As you sit here now, you can think of nothing significant about October 1994 or October 24th, 1994, other than the Michigan contract?
 - A. No.
 - Q. Do you have any understanding as you sit here, ma'am, that you actually pled guilty to obstructing an audit on October 24th, 1994? Does that even register with you?
 - A. Oh. I pled guilty in January is what --
 - Q. No, I'm not talking about January 1999. Did you understand in January of 1999 when you did plead guilty that you pled guilty to obstructing an audit of the government on October 24th, 1994? If you don't, that's okay.
 - A. It hasn't registered like that.
- 13 On cross examination, the witness explained that he had shredded paper claims because he thought they had already been transmitted in electronic format; this conduct formed part of the factual basis for his guilty plea:
 - Q. You did not tell anyone that you had shredded the claims, did you?
 - A. Not at that point in time.

 - Q. My question was, sir, at the time you did this act, you had no intention to violate any regulation?
 - A. No.
 - Q. To break any rule?
 - A. Not at that point with those particular claims.

 - Q. So at that point in time you weren't trying to deceive HCFA about what you were doing or pull a fast one or convey any kind of false information to HCFA, were you?
 - A. No, I was not.
- 14 *E.g.*, large increases due to the dollar amount involved in the offenses and all related conduct (§2F1.1(b)(1)); the complexity of actions involved and the number of potential victims (§2F1.1(b)(2)), the role in the offense (§3B1.1), and the vulnerability of typical victims of such offenses (§3A1.1).
- 15 These are terms from a plea agreement in the Blue Cross case:
 - Q. Paragraph 1 of your plea agreement . . . states, does it not, that the first sentence of paragraph 1 states, Defendant *will cooperate fully* with the United States, period.
 - A. Yes.
 - Q. And in paragraph 3 of that plea agreement, the agreement calls for the defendant to *do all things deemed necessary by the United States Attorney and/or law enforcement agents to assist law enforcement in their investigations* into activities which the defendant is involved or about which he knows. Do you recall that?
 - A. Yes.

- Q. And as part of this plea bargain, in return for your agreement to cooperate fully with the United States and to do all things necessary to assist them in their investigation, as part of that plea agreement, you understood that the government had agreed to ask the Court at the time you were sentenced to reduce your sentence from that maximum that you expected that you would otherwise get, did you not?
- A. That the government would ask the Court, yes.
- Q. So in exchange for your cooperation, the government was going to ask the Court to reduce your sentence, correct?
- A. Yes.
- Q. All right. And you understood that it was completely up to the United States Attorneys as to whether or not to make that motion to the Court, correct?
- A. With my attorney.
- Q. Well, you understood that the United States Attorneys had discretion to either make that motion or not make that motion based on their evaluation of whether you had fully cooperated with the United States?
- A. Yes, again, I was taking a risk. *I was taking their word for it.*
- 16 *See, e.g., Wade v. United States*, 504 U.S. 181, 185 (1992) (absent unconstitutional motive, government has broad discretion to withhold §5K1.1 motion); *United States v. Burrell*, 963 F.2d 976, 985 (7th Cir. 1992) (affirming plea agreement preserving government's sole discretion to make departure motion).
- 17 *See, e.g., United States v. Cunningham*, No. 99-1167, 2000 WL 2003, *5 (1st Cir. Jan. 6, 2000) (citing *United States v. Dethlefs*, 123 F.3d 39, 43 (1st Cir. 1997)).
- 18 For example, a government witness on cross examination:
- Q. Well, if you didn't tell any of the [outside counsel] interviewers that and you didn't tell the federal agents that and you didn't tell myself and the investigator who was with me a year ago, then we have covered a four-year period of time during the course of which these events have been investigated that you have never referred to a conversation in which you told [my client] about excluding black dot files [a practice of hiding errors from HCFA auditors].
- A. That's correct.
- Q. The first time you've ever recounted having that conversation was in this courtroom today, is that right?
- A. We talked about it. I talked about it with the prosecutors last week.
- ***
- Q. The federal government told you last Friday that you were not going to be prosecuted, correct?
- A. Yes.
- Q. That's the first time that you ever recounted to anyone that you can recall this conversation about [my client] and the black dot files?
- A. Yes. If you say so.
- 19 That sort of communication might require the formality of a joint defense agreement to withstand a privilege challenge. But see *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, *5 (N.D.N.Y. Sept. 28, 1992) ("[T]he existence of an agreement does not change the character of the [joint defense] privilege . . .").
- 20 Q: So this document, would you agree with me, is at best a very confused version of the Medicare Carriers Manual?
- A: I would say that for your purposes, it would be even more confusing than it is for me, yes.
- Q: And certainly incomplete?
- A: It is incomplete.
- 21 Candor compels acknowledgement that the source of this effective and comical argument was our colleague at the defense table, Bill Lucco of Belleville, Illinois.
- 22 *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.).
- 23 *United States v. Heidecke*, 900 F.2d 1155, 1162 (7th Cir. 1990).
- 24 *See also, e.g., United States v. Garvin*, 565 F.2d 519 (8th Cir. 1977) (reversing conviction in which trial court had refused to permit defendant charged with mail fraud to introduce evidence of honest responses to questions on applications for insurance policies other than those on which the mail fraud prosecution rested). More recently, the Seventh Circuit reversed the conviction of the Treasurer of the City of Chicago, who had been charged with a mail fraud scheme involving the extortion of campaign contributions from firms that conducted financial business with the city, in part because the trial court had erroneously prevented the defense from introducing evidence that some firms who continued to do business with the city had not made campaign contributions, a fact that would have countered evidence of the fraudulent scheme alleged by the government. *See United States v. Santos*, No. 99-2934, 2000 WL 36940, *6 (7th Cir. Jan. 19, 2000).
- 25 *See, e.g. Arnold J. Rodin, Inc. v. Atchison, Topeka and Santa Fe Railroad Co.*, 477 F.2d 682, 686 n. 6 (5th Cir. 1973) (citing *Houghton v. Jones*, 68 U.S. (1 Wall.) 702 (8163)) ("The so-called American Rule followed in most states and in the federal courts limits the cross-examination to matters included within the scope of the direct examination.").

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