



TEXAS MEDICAID FRAUD CONTROL UNIT, A TROJAN HORSE

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Overview

Texas spends more than \$17 billion annually to fund its portion of the Medicaid program.³ In an effort to control Medicaid costs and at the same time combat abuse, the Texas Attorney General’s Office (“OAG”) and the Texas Legislature has inadvertently created a system that has encouraged—and even required—the intertwining of civil and criminal investigations to the detriment of the proper administration of criminal justice. It is likely that the legislation is in violation of Constitutional Fifth Amendment due process limitations, since the system allows a civil administrative investigation to act as a Trojan horse for a parallel criminal investigation by gaining the cooperation of an unsuspecting criminal target, who would have otherwise invoked protections against self-incrimination. The Texas Legislature should demarcate clear barriers between civil and criminal investigations to protect health care providers and thereby foster trust and cooperation. Until that time, however, courts should suppress evidence or dismiss indictments where there is prejudicial civil/criminal intertwining.

Medicaid Fraud Investigative Agencies

Various state agencies investigate Medicaid providers for compliance issues and fraud. Medicaid Fraud Control Unit (“MFCU”) is the criminal investigation arm of the Texas Office of the Attorney General (“OAG”). Texas House Bill 2292 gave MFCU prosecutors concurrent jurisdiction, with the consent of the local county district attorney, to prosecute relevant state felonies, such as fraud and theft.⁴ MFCU’s investigations may result in imprisonment, fines, and exclusion of providers from the Medicaid program.⁵ The civil arm of the OAG is Civil Medicaid Fraud Division (“CMF”), which investigates and pursues civil fraud.⁶ Finally, there is the Health and Human Services Commission (“HHSC”) in the Office of Inspector General (“OIG”). This

agency conducts administrative reviews and on-site provider verifications, which are sometimes performed by MFCU investigators.

Texas HB 2292 Promotes Information Sharing by Demoting Due Process Concern

Texas HB 2292 granted the OIG subpoena power to compel the production of documents directly from Medicaid providers.⁷ Thus, all documents produced via OIG subpoenas are available to MFCU criminal investigators in building a criminal case. HB 2292 mandated that whenever a provider's records are withheld from the OIG, the case will be immediately turned over to MFCU.⁸ Thus, a red flag is raised anytime a provider refuses to timely respond to an OIG subpoena or demands the presence of legal counsel during an initial interview. Therefore, the genesis of MFCU's involvement is not an implication of criminality, but the invocation of a person's Constitutional rights.

The Texas Human Resource Code also allows MFCU to use a Civil Investigative Demand, a process that requires the provider to produce documentation discoverable under the Texas Rules of Civil Procedure.⁹ This mechanism permits MFCU to request documents under the guise of a civil disclosure, while avoiding the checks and balances of a grand jury subpoena.

OIG and MFCU Collaboration Required

The OIG and MFCU participate in monthly meetings to discuss individual cases¹⁰ and hold quarterly meetings to promote collaborative efforts at all levels.¹¹ MFCU's criminal investigators supplement OIG by conducting on-site provider verifications for providers who meet the profile for criminal fraud, such as durable medical equipment suppliers.¹² Since fifty-two members of MFCU's staff are commissioned peace officers, the result is that criminal investigators initiate investigations of high-risk type providers under the guise of an administrative review.¹³ This level of cooperation and coordination between the MFCU and HHSC-OIG is statutorily required.¹⁴ MFCU and OIG do not run parallel investigations but rather attack a case in a coordinated effort, to build the best possible case against the target.

Improper Parallel Investigations:

Parallel civil and criminal proceedings that examine the same conduct are not only permissible but often considered to be in the public interest.¹⁵ However, when parallel civil and criminal investigations become too intertwined they cease to be parallel and could violate the Constitution's Fourth, Fifth and/or Sixth Amendment. In determining whether an investigation has become improperly intertwined, courts generally consider: (1) whether there was any notice that evidence provided could be used in a criminal proceeding¹⁶; (2) whether the civil investigation was brought in bad faith¹⁷; (3) whether the target of the investigations was represented by counsel¹⁸; (4) whether the defendant invoked his Fifth Amendment right against self-incrimination¹⁹; (5) whether the defendant waived those rights.²⁰

"The prosecution may use evidence obtained in a civil proceeding in a subsequent criminal action unless the defendant shows that to do so would violate his Constitutional rights or depart from the proper administration of criminal justice."²¹ Where the government made affirmative misrepresentations or "conducted a civil investigation solely for purposes of advancing a criminal case," the defendant is prejudiced and either the evidence obtained should be suppressed or the court should dismiss the indictment.²² Failure to disclose the possibility or

existence of a criminal investigation is acceptable, so long as no affirmative misrepresentations are made.²³ However, suppression or dismissal *is* appropriate where there is evidence of “trickery or deliberate misleading” by the government in covering up the existence of a criminal investigation.²⁴

In *United States v. Stringer*, the district court dismissed criminal indictments against three individual defendants charged with securities violations based on the premise that the government engaged in deceitful conduct, in violation of defendants’ due process rights, by simultaneously pursuing civil (SEC) and criminal investigations of defendants’ alleged falsification of the financial records of their high-tech camera sales company.²⁵ Federal securities laws authorize the SEC to transmit evidence it has gathered to the United States Attorney’s Office (“USAO”) to facilitate a criminal investigation by that Office.²⁶ To gather evidence for its criminal investigation, the Oregon USAO sent a letter to the SEC requesting access to the SEC’s non-public investigative files, and the SEC promptly granted access. The civil and criminal investigations proceeded in tandem and the SEC continued to meet and communicate with the USAO and FBI. The SEC turned over documents the SEC collected through its civil investigation. The Ninth Circuit reversed, however, because in the standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. Therefore, “there was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make.”²⁷

In *United States v. Scrushy*, the court granted a motion to suppress evidence holding that the government departed from the proper administration of justice when it conducted a criminal investigation using civil means.²⁸ The defendant was the target of an SEC investigation.²⁹ Prosecutors from the USAO contacted the SEC, encouraged them to move the place of their meeting with the defendant to a location within their jurisdiction, gave the SEC direct input concerning the questions to be asked at the deposition, and the SEC agreed to conduct the questioning in a manner which would prevent the defendant from discovering he was the target of the government criminal investigation — including omitting questions the federal prosecutor was afraid would tip off the defendant to the possibility of a criminal investigation and which they would otherwise have asked.³⁰ The SEC agents complied with the requests from the prosecutors and enlarged the scope of its questioning based on their conversations with them.³¹ The court reasoned that there was a “danger of prejudice flowing from testimony out of a defendant’s mouth at a civil proceeding [which] is even more acute when he is unaware of the pending criminal charge.”³² Additionally, the civil investigators were on notice of the criminal investigation, and received input to aid the criminal investigation.³³ When the civil investigation changes or adapts to suit the criminal investigation, the tracts of parallel investigations have intersected and the investigations have become improper.³⁴

MFCU Prosecutions on the Rise

There is an increased focus by the State of Texas on criminal prosecution of Medicaid fraud.³⁵ Of the sixteen agencies that receive case referrals from the OIG, MFCU received 76% of the referrals in the third and fourth quarters of fiscal year 2008.³⁶ 59% of all the cases OIG opened were referred to MFCU.³⁷ The number of cases referred to MFCU from OIG grew from 24 in the first quarter of fiscal year 2008 to 112 in the fourth quarter.³⁸

MFCU can be expected to be more aggressive, take on a greater caseload, and pursue more cases for criminal prosecution, since HB 2292 mandated a massive staff increase from 36 to nearly 200 at the end of fiscal year 2008.³⁹ MFCU state prosecutors now have concurrent jurisdiction to take cases to trial that local district attorney would not have pursued,⁴⁰ and they have been deputized by various district attorneys to prosecute without case specific consent, while continuing to send cases to local prosecutors.⁴¹ An increasing number of cases are also being prosecuted through the federal system.⁴²

Reformers push to further blur the distinction between civil and criminal investigations by purposing that Texas state peace officers staff the Texas Health and Human Services Commission (“HHSC”).⁴³ This would allow HHSC investigators to draft criminal subpoena requests, and would make them criminal investigators conducting (ostensibly) civil investigations.⁴⁴ In an effort to break down the barriers to information sharing between the civil and criminal investigation wings, reformers often cannot see past the need for effectiveness and efficiency in the criminal justice system and fail to appreciate the implications of their reforms on the constitutional rights of criminal defendants.

Prospective Solutions

Courts will carry the initial burden to protect the rights of criminal defendants from the overreaching created by the Texas statutory scheme. Texas district courts should be open to dismissing indictments, or in the alternative suppress evidence, where criminal investigators: (1) use the pretense of a civil investigation as a Trojan horse for a criminal investigation, (2) use civil or administrative discovery devices to compel the production of evidence that could not be reached operating within the confines of the criminal justice system; those actions violate due process Fifth Amendment protections and the proper administration of criminal justice.

Moreover, the Texas’ legislature should revise the Medicaid fraud enforcement statutory scheme to create clear barriers between criminal and civil investigations to safeguard the constitutional rights of providers while maintaining an effective Medicaid fraud prevention and enforcement scheme by:

- (1) removing statutory authority for criminal investigators to use civil or administrative discovery devices to build a criminal case;
- (2) requiring OAG investigators to immediately give notice to providers, on first contact, as to the nature of their investigation, whether civil or criminal;
- (3) requiring civil investigators to notify providers that any statement made or documents produced in compliance with civil or administrative discovery can be used in a criminal proceeding against them and request them to waive Tex. R. Evid. 408 and 410 where applicable;
- (4) create a barrier between civil administrative and criminal investigators to prevent the sharing of statements or documents to which Tex. R. Evid. 408 and 410 are applicable or to evidence where no notice of possible use in a criminal proceeding was given;

(5) build safeguards to prevent the referral of a case from a criminal investigation unit like MFCU to a civil investigation unit like CMF or HHSC-OIC for the purpose of building a criminal case.

The political will required to ensure the integrity of the Texas criminal justice system may not exist in sufficient quantity in our courts or legislative halls. It is unlikely that “Protecting the Constitutional Rights of Medicaid Fraud Defendants” will become a fashionable campaign slogan or fill campaign coffers. The demarcation between criminal and civil investigations (and investigative tools) may have to continue to be drawn at the federal level, where the political climate likely holds less influence on judicial decision-making.

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³ Press Release, Off. Att’y Gen. of Texas. Former Children’s rehab Clinic Founder in McAllen Sentenced to 10 years in Scheme Defrauding Medicaid, June 23, 2008. Available at http://www.oag.state.tx.us/_oagNews/release.

⁴ JOINT SEMI-ANN. INTERAGENCY COORDINATION REP., MARCH 1, 2008-AUGUST 31, 2008, at 6.

⁵ *Id.* at 6.

⁶ *Id.* at 7.

⁷ H.B. 2292, 78th Tex. Leg., § 2.20 (2003).

⁸ H.B. 2292 § 2.19.

⁹ TEX. HUM. RES. CODE ANN. 2 § 36.054.

¹⁰ *Id.*

¹¹ OFF. ATT’Y GEN. & TEX. HEALTH & HUM. SERV. COMM’N, JOINT SEMI-ANN. INTERAGENCY COORDINATION REP., MARCH 1, 2008-AUGUST 31, 2008, 1 (http://www.oag.state.tx.us/criminal/mfcu_reports.shtml).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

¹⁶ *United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008).

¹⁷ *United States v. Kordel*, 397 U.S. 1, 6 (1970) (Bad faith is shown by the government using the civil process in order to circumvent the restrictions of a criminal investigation. When a criminal investigation precedes the civil investigation there is also likelihood of bad faith, thus the timing issue is significant to any analysis of parallel civil and criminal investigations due process violations); See, *United States v. Carriles*, 486 F.Supp.2d 559, 619-621 (W.D. Tex. 2007) (A criminal indictment is dismissed for bad faith when a civil investigation is initiated solely to collect evidence in support of an ongoing criminal investigation).

¹⁸ *Stringer*, 535 F.3d at 934-935.

¹⁹ *Kordel*, 397 U.S. at 10.

²⁰ *Minnesota v. Murphy*, 465 U.S. 479, 486 (1951).

²¹ *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) (citing *Kordel*, 397 U.S. at 12-13).

²² *Stringer*, 535 F.3d at 937.

²³ *Id.* at 940. See, *United States v. Prudden*, 424 F.2d 1021, 1030 (5th Cir. 1970) (IRS agents did not have a duty to state they were conducting a criminal investigation as other factors put the defendant on notice, absent an affirmative misrepresentation of a lack of a criminal investigation there were no constitutional violations).

²⁴ *Stringer*, 535 F.3d at 941.

²⁵ See, *United States v. Stringer*, 408 F.Supp.2d 1083 (D.Or. 2006).

²⁶ See, 15 U.S.C. §§ 77t(b), 78u(d).

²⁷ *Stringer*, 535 F.3d at 930.

²⁸ *United States v. Scrushy*, 366 F.Supp.2d 1134, 1137 (N.D. Ala. 2005).

²⁹ *Id.* at 1135.

³⁰ *Id.* at 1135-1137.

³¹ *Id.*

³² *Id.* at 1139 (Quoting *Parrot*, 248 F.Supp. at 200).

³³ *Id.* at 1138.

³⁴ *Id.* at 1139.

³⁵ MFCU aided state and/or federal authorities in the following cases: Press Release OAG, *Former Children's Rehab Clinic in McAllen Sentenced to 10 Years in Scheme Defrauding Medicaid* (June 23, 2008); Press Release USAO SDTX, *Houston Man Sentenced to Prison in Adult Diaper Case* (September 11, 2009); Press Release USAO SDTX, *McAllen Cardiologist Sentenced to Prison on Health Care Fraud Violations* (August 20, 2009).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ OFF. TEX. COMPTROLLER PUBL. ACCT., TEX., SPECIAL REP: REVIEW & ANALYSIS OF THE PUB. ASST. FRAUD OVERSIGHT TASK FORCE, DEC. 2006, at 6.

⁴⁴ *Id.*