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Outlook 2023: With Enforcement Picking Up, Expect More Private Equity, MA, Telehealth Cases

By Nina Youngstrom

It wasn't long ago that whistleblowers and their attorneys found the government "less than interested" in False Claims Act (FCA) cases against private equity and their portfolio companies, but times have changed, according to Jeb White, president of Taxpayers Against Fraud (TAF). The shift became apparent when Department of Justice (DOJ) lawyers started attending TAF conferences on private-equity whistleblower cases and presenting at private-equity industry conferences, warning firms against "stepping over the line," he said. It was a feedback loop, because more whistleblower attorneys are willing to file FCA complaints if they think DOJ will bite.

It's why private equity investors and their health care portfolio companies are expected to have a target on their back in 2023. That has the potential to affect players across the industry. "Every corner of the health care world has been infused with private-equity money," White said. What drives the cases: "Greed before patient need is often the mantra we hear from whistleblowers."

In addition to private equity, attorneys predict the enforcement action will be in the Medicare Advantage (MA) space, kickbacks, telehealth and antitrust, along with the usual grab bag of billing and coding violations. An active year of enforcement is expected after "a lot of deferred maintenance of compliance and enforcement during the pandemic," said attorney Larry Vernaglia, with Foley & Lardner LLP. "Buckle your seatbelts for 2023 and 2024."

In terms of private equity investors, "DOJ believes there is a prioritization of profits over patient care," said attorney Asher Funk, with Troutman Pepper in Chicago. Even President Joe Biden made a statement to the effect that quality of care is lower in nursing homes that are owned or backed by private equity in his 2022 State of the Union address. "I disagree and dispute that DOJ's sentiment about private equity is accurate, but acknowledge that's how the government views it." The involvement of private equity firms with their portfolio companies can vary, Funk said. Investors may provide funds, sit on the board and select managers of their portfolio companies and possibly have a more hands-on role. They could face FCA liability, depending on their level of oversight, but "simply having people on the board is probably not enough to cross the line," he explained. Dictating strategy and involvement in day-to-day operations is another story.

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