

# Health Care Beat: Episode 54 - Enforcement in Focus: Practical Tips and Emerging Trends for Health Care Organizations

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## **Amanda Genovese**

Welcome to Health Care Beat, a health law podcast brought to you by Seyfarth Shaw's cross disciplinary Health Care group.

## **Chris DeMeo**

Each Health Care Beat episode focuses on key industry trends and legal developments while identifying practical takeaways for those dealing with these issues every day.

## **Amanda Genovese**

I'm Amanda Genovese, a Seyfarth attorney in New York.

## **Chris DeMeo**

I'm Chris DeMeo, a Seyfarth attorney in Houston. Let's get started.

## **Amanda Genovese**

On this episode of Health Care Beat, we'll explore the latest trends in health care enforcement. We will also discuss practical steps health care organizations can take to manage risk. Joining us is Torrey Young, a partner in Seyfarth's commercial litigation department. Torrey is a member of the firm's trials and health care litigation practices, and I'm lucky that Torrey is here with me in New York. Torrey, welcome to Health Care Beat.

## **Torrey Young**

Thanks, Amanda.

## **Amanda Genovese**

Alright, so to start things off, why don't you tell us a bit more about your practice?

## **Torrey Young**

Sure. So, I counsel companies and individuals across the health care industry, and I really guide them through every phase of regulatory and enforcement challenges. So perhaps pandering to my client base, but I like to say that it's everything from preventative medicine, developing compliance programs and drafting policies, to triage, investigations, litigation, and government enforcement. And some of my past experiences have included defending False Claims Act cases in federal court, securing dismissals of qui tam actions alleging violations of the anti-kickback statute, obtaining summary determinations in matters brought by the Attorney

General's office, and even achieving declinations from the federal government in health care fraud investigations. So those are just a few of the types of cases that I deal with.

**Chris DeMeo**

Great. Torrey, this is Chris DeMeo, and I, for one, am delighted to have you aboard, not just on the podcast, but at the firm. And one thing, I don't know if it came through, you're in orange jumpsuit territory sometimes, right? I mean, people might go out in cuffs if you don't do the right thing.

**Torrey Young**

I certainly am involved in a number of health care criminal cases, yes.

**Chris DeMeo**

Yeah, where it gets serious. So, switch it to the interview. And it's funny because you and I were just talking about this today regarding another client. But for the listeners, I think it'd be good for you to set the table as to what the government's priorities are now as far as health care enforcement and the topics that they're interested in, and then the methods that they're using to do the enforcement.

**Torrey Young**

Sure. So, I really focus on the OIG work plan as a place to understand enforcement trends. The OIG work plan is no longer just a list of audits. It really is a roadmap for future enforcement. And historically, work plan items often preceded False Claims Act cases or audits with extrapolations and payment returns, but what's notable now, I think, is that there's a concentration of attention in certain high-growth service lines rather than just broad provider categories. And we're seeing a lot of enforcement that maps those high-growth service lines. So, for example, we're seeing a lot of enforcement activity in wound care and skin substitutes, which made the work plan list this past year. And why is that? With a lot of these things, it's followed the money. Medicare Part B, I think, spent about \$10 billion on skin substitutes by the end of 2024. Yeah, right. Dropping the hat. So, you know, it's not exactly a surprise that this is now high up on the enforcement list for the government. There are other areas too, you know, such as home health and post-acute care. But I think apart from kind of the broad categories that we typically see for coding and necessity, you can also focus on these service lines as part of the enforcement focus.

**Chris DeMeo**

Well, that's extremely helpful to know. And I'm wondering if you have any observations or comments about what you're seeing with the use of AI in these investigations for audits and then for picking out who are the parties that are doing a lot of these service lines that are getting the government's attention?

**Torrey Young**

Yes, the data and use of data is driving a lot of the enforcement too. So, the work plan reflects this - talks about how they're using data aggregation and trend analysis to select audit targets. We're seeing it in the letters that providers get from the MACs and the UPICs that reference the data. And there's also the new Data Fusion Center, which is the government's centralized analytics engine that pulls together lots of different data, the Medicare and Medicaid claims data, audit results, and prior enforcement findings. It even pulls whistleblower allegations, which I believe can include before they're full-blown False Claims Act cases, just whistleblower tips, CMS contractor data. So that's, you know, your MACs and your UPICs, and other open source and commercial data sets. So, there's now this database that is no longer looking at a particular provider or a particular claim, but it's giving the government a much bigger picture in terms of

pattern recognition. And that means providers are being looked at and benchmarked in whole new waves. I mean, we've historically had some regional peer analysis or utilization norms, but I think this draws kind of from a whole different set of information that allows different patterns to be viewed. And that kind of pattern recognition means that by the time you hear from the government, they already know what they're looking for, right? You know, there's a different level of understanding and information that they have as compared to what it's been like in the past.

**Chris DeMeo**

And Torrey, are you seeing that the use of the data fusion center and these other items that you've been discussing, is that making the government more efficient? I know when people talk about AI to me and encourage me to do it, they say it makes you more efficient, right? So, do we see that the government is coming out more quickly - like they catch the error faster, so it's not necessarily six years of claims or getting it in the bud, or they're able to do more? Does this cost a broader network for providers out there?

**Torrey Young**

I think that's right. I think we're seeing cases being brought faster, where the claims are not as old or stale. I think it's being used to prioritize, narrow, and accelerate enforcement. I think it's also helping inform the government as to where to look first. It doesn't supplant or replace the decision-making about when to bring a case or which case to bring, but it's telling the government where to look.

**Chris DeMeo**

And so, pivoting a little bit to the provider perspective, from a litigation and investigation standpoint, what are the most effective steps that you see organizations taking early on to reduce exposure during an audit or other investigation?

**Torrey Young**

And I think one of the first things that a provider can do is be on top of their own data. I mean, the real question is whether the data tells the same narrative that you would as a provider. So, understanding that there might be coding consistently in a certain way - but is that because you have a certain patient population, or is that because you are receiving referrals where there's already kind of a heightened level of acuity? Or is it because you have someone who is a fraudulent biller, right? I mean, one of those is what the government's assuming. But you need to understand the data, understand why it looks the way it does, why the government's interested. And one of the ways to do that is to try to be on top of it before they come knocking, right? And there are ways in which compliance officers in-house counsel, doing your own internal audits, ways in which you can have an understanding of where you stand or what your data looks like - because you should be operating under the assumption now that that's always being assessed and assessed where you're being benchmarked in terms of utilization, site of service comparisons, and geographic areas. And there are ways that providers can do that on their own, where you're not suddenly surprised by an FBI agent at your door.

**Chris DeMeo**

Right. And so, as you were talking, a question popped into my head as far as we talked about these service lines. Is that something where if you're in an industry and a lot of your colleagues or competitors are getting audits, is that a red flag maybe that you should be starting to look at your own house a little bit and make sure everything's in order?

**Torrey Young**

That's exactly right. I think you could look at the OIG work plan and think to yourself, am I in the

line of sight? I mean, anyone in health care is right to some extent. It's a highly regulated industry, but I think there are certain areas right now that are truly in focus. And rather than waiting to see where you stand, you can conduct an internal assessment or do an audit or assess your compliance program and billing practices because it would allow you to be prepared. And I'm going to say when instead of if you get some type of inquiry, because it might be a CID, it might be a whistleblower, it might be a MAC audit - there's going to be some level of scrutiny in these areas, it seems like. And so, you want to know what's going on. Where do our practices stack up and how can we fix them in advance if we need to?

**Chris DeMeo**

And what's a CID again?

**Torrey Young**

Sorry, a civil investigative demand - that's one other thing I'll say right now is that I'm seeing a lot of parallel investigations as well as referrals. I think the line of communication between the Medicare audits, the UPIC audits, the civil investigative demands, and criminal enforcement has become a lot more blurred because the data is all getting dumped together in the fusion center, right? And so, I think you have to imagine that you might be at risk sooner in the criminal territory, depending on what your data looks like.

**Chris DeMeo**

Well, that's good news. Last thing, I mean, I could talk to you all day, Torrey, and you know that because I think we have before. But one last question, and I promise I will stop. So, we see a lot of people, maybe because of this efficiency, the broader network, what have you, getting these letters for the first time, right? And they've heard about them and they're not completely naive, but they get them and never seen one before and they're not, thankfully for them, adept at communicating with these auditors and government investigators. Can you identify maybe some red flags that say, okay, if the audit letter says this, then maybe, you know, this, you got to increase this to DEFCON one. But if you see this one, then it's not like you don't have to worry about it, but it's something that's more manageable.

**Torrey Young**

I think that the error rate is a usual typical indication of where you stand on the red flag spectrum. OIG has all sorts of guidelines and statements about certain error rates and percentages, but I'd say 5% and below you're in green flag territory. And this is all generally speaking, of course, but anything in the 20s and 30s you need to deal with, much more than that, once you're talking about half of your claims or more, I think there is going to be some pretty serious scrutiny. And so, you need to figure out, why is that? Do they have it completely wrong? Did a portion of our medical record not get sent or uploaded? Is there some LCD that they're applying for that does not apply here whatsoever? What's the answer? Because otherwise it's pretty hard to explain why half or three quarters or every single claim that's going out the door, they view it as improper. And so, I definitely look at the error rate, the sample size, of course, and the frequency at which you're getting audited. But if you're getting one audit here and there, that's probably normal course of business. Once you start getting more and more, I think you can really stop and think, where do we stand? Because everyone's looking at me right now. And that's also a problem.

**Amanda Genovese**

And Torrey, at that point, at what point in time does it make sense to move the responses, the interactions with the government, to move it from either the business team - which I have a lot of feelings on that - but even remove it from the legal team to getting outside counsel involved,

right? To have those discussions, protect the privilege. At what point in time do you think that makes the most sense?

**Torrey Young**

I think that there are normal course internal audits or external audits that the business and compliance and potentially internal legal team are equipped to handle. But when you're getting out of the ordinary UPIC letters, MAC letters, a subpoena, even a CID, and I absolutely would say an agent showing up, I think it's critically to engage outside counsel and run this through a privileged process. And that's because there are so many wires that a provider can trip that it's important to know how to do this and to protect certain communications, consultant or expert analyses, making sure that data is collected and preserved appropriately. And it really is a critical time when you're developing the responses and narrative, particularly to the government, where you want to protect the client as much as possible. And so, I think that's when I would say we should be there.

**Amanda Genovese**

That makes good sense to me. Well, Torrey, thank you again. That's all the time we have for today, but we'd like to thank you for joining us and sharing your expertise with our listeners.

**Torrey Young**

Thanks for having me.

**Chris DeMeo**

And thank you for joining us for another edition of Seyfarth's Health Care Beat podcast, bringing you the latest developments and pressing issues in health law so you'll never miss an episode. Be sure to visit [Seyfarth.com](http://Seyfarth.com) or follow us on SoundCloud or Apple podcasts. If you enjoy this episode, please share it with your friends and colleagues. We look forward to having you with us again soon.