

# Insurance Fraud Investigations

## Constitutional Challenges to the State's Outsourcing of Fraud Investigations to Insurers

by Michael S. Weinstein

**T**here is no question that the investigation and prosecution of insurance fraud in New Jersey is a laudable goal. Ideally, holding insurance cheats responsible for their fraudulent conduct serves the vital purpose of curbing the ever-increasing cost of healthcare, with the concomitant hope of reducing health insurance premiums for millions of New Jersey residents. More cynically, these prosecutions are targeted at bolstering an insurance company's bottom line. But whether the goal is to protect the citizens of the state or the profits of ABC Insurance Company, the path to achieve it should be carefully balanced with the constitutional protections afforded each healthcare professional who is placed under the spotlight of an investigation.

### Special Investigative Units

In most cases, health insurance fraud investigations begin within the confines of an insurer's special investigative unit (SIU). Since the late 1980s, insurers have employed SIUs to identify and investigate possible incidents of insurance fraud. These units are usually staffed by former law enforcement officers and claims personnel who are trained by law enforcement to recognize deceptive billing practices, collect provider claim information, and obtain testimony through comprehensive provider interviews.

The SIU can target a provider based entirely on what it deems a suspicious billing or treatment practice, and launch an investigation against that provider. Such an investigation may include interviews with patients and detailed reviews of medical charts. These investigations can be used by insurers to pursue private civil actions against a healthcare provider under New Jersey's Insurance Fraud Prevention Act (IFPA).<sup>1</sup> Alternatively, they can be forwarded to either the Department of Banking and Insurance (DOBI) for civil enforcement or to

the Office of the Insurance Fraud Prosecutor (OIFP) for criminal prosecution. Criminal prosecution of insurance fraud in New Jersey can carry serious penalties, including imprisonment for five to 10 years. With the stakes this high, the OIFP's investigative conduct should be held to a high standard. Without legislative guidance, OIFP has the potential to take some dangerous shortcuts, resulting in the potential denial of basic constitutional protections.

In many cases, an OIFP investigation begins with a review of evidence gathered exclusively by an insurance company's SIU. An SIU may receive a complaint from one or more of its members regarding the billing practices of a provider, or it may suspect an unusual pattern in treatment and billing of certain cases and commence an investigation. Often, an SIU investigator will send out questionnaires to patients or conduct one-on-one patient interviews inquiring about a provider's treatment and billing practices. In many cases, after it has compiled what it feels could be damning evidence against a provider, the SIU will ask to meet with the provider and request they submit to an examination under oath (EUO) or sign a statement citing the results of the investigation and admitting to wrongdoing under the threat of a civil action pursuant to the IFPA. Providers are then given an opportunity to resolve the dispute with the insurance company by making restitution of an agreed-upon amount. Unfortunately, this process may only be the beginning, not the end, of their problems.

Unlike law enforcement investigators, SIUs are not governed by a body of law that protects the provider's constitutional rights. Accordingly, providers are not read their Fifth Amendment rights. Specifically, they are not told that any statements given to the investigator can be used in a subsequent criminal prosecution against them, often resulting in unwitting and binding admissions by the provider without the opportunity of having counsel present.

Often unknown to the medical provider is the fact that the SIU file, which includes statements from the provider and may include incriminating admissions, later becomes part of a referral package forwarded by the SIU to the OIFP for possible criminal prosecution for insurance fraud. The provider's statement, often made without the assistance of counsel and given to resolve a private dispute with an insurance company, could serve as the centerpiece of a potentially career-ending criminal prosecution.

### **Constitutional Implications of an SIU's Evidence Gathering**

This process of gathering of evidence by an SIU that is later used by criminal prosecutors is unique because the governing IFPA statute lacks any constitutional protections over how the evidence is gathered. Through the mandatory referral provision of the IFPA, the state has 'deputized' SIU investigators to collect evidence from providers without requiring even the bare minimum of protections traditionally afforded, and required, by the Fifth Amendment. By virtue of the IFPA language, the investigation of a private actor, here, insurers, is outsourced not unlike many other businesses of today.

The current regulatory scheme of various New Jersey banking and insurance laws contemplates extensive cooperation between the OIFP and investigators employed by healthcare insurers. In fact, the IFPA explicitly contemplates utilizing the results from civil healthcare fraud investigations for use in subsequent state criminal prosecutions. The statute provides that "[t]he existence of a consent agreement under this subsection shall not preclude...referral to law enforcement for consideration of criminal prosecution."<sup>2</sup> As such, the statute allows civil healthcare fraud investigations have the potential for referral to the OIFP for criminal prosecution. The reality that many OIFP prosecutions are pre-packaged by an SIU inves-

tigation requires counsel to act to protect the rights of healthcare providers.

The Legislature, at least in part, recognized the need for the OIFP and the SIU to work in unity in prosecuting insurance fraud by virtue of the mandatory referral provision. The specific language of the IFPA is also clear on the interrelationship between the state and insurers when investigating fraud.<sup>3</sup> Because of the mandatory wording of IFPA, SIU investigations are often precursors to a subsequent state prosecution. The IFPA specifically utilizes the word "shall" when discussing the need for a referral to the OIFP when evidence of insurance fraud surfaces.<sup>4</sup> Insurers, therefore, have no discretion in deciding whether to refer matters to the OIFP, but rather, must do so "immediately" once the evidence of fraud appears.<sup>5</sup>

However, the Legislature and courts stopped short in requiring that the SIU be governed by basic principles of due process in conducting its investigations.

Similar tensions exist in other areas of joint civil and criminal investigations, including investigations by the Division of Youth and Family Services (DYFS). For example, an act of suspected child abuse affects two joint state interests. First, the state is interested in protecting a child in a civil action through Title 9 actions. Second, law enforcement has an interest in prosecuting criminal offenses such as endangering the welfare of a child and child abuse. Understandably, statutes and regulations govern the relationship between DYFS caseworkers and state law enforcement officials. The purpose of child abuse state regulations is to "[e]stablish a framework for liaison and improved communication and cooperation between the Department's local offices and the prosecutors' offices in order to further the mutual goals of protecting the child and proper law enforcement."<sup>6</sup> In fact, DYFS must provide information about suspected abuse and neglect to

the county prosecutor.<sup>7</sup> The prosecutor is also required to consult with DYFS about whether a criminal investigation is necessary, and to inform DYFS when a decision is made to initiate criminal proceedings.<sup>8</sup> Such regulation utilized in DYFS proceedings should be instructive for counsel handling insurance matters.

The SIU and OIFP relationship is similar, yet the OIFP lacks the built-in constitutional protections or case law afforded in the DYFS regulations. As documented in their annual reports, the OIFP relies heavily on SIUs for evidence of insurance fraud.<sup>9</sup> The OIFP assesses the evidence to first determine whether the office will prosecute a provider for insurance fraud.<sup>10</sup> Although the IFPA encourages referrals by SIUs to criminal prosecutors, the law is silent (in contrast to the DYFS regulations) on the necessary framework and balancing of constitutional rights and protections inherent in pending parallel civil and criminal proceedings.

Because of the unique scope and breadth of the IFPA, SIUs, or any other private individual acting as an outsourced deputized agent of the state, these investigators should face heightened scrutiny when gathering evidence for use in a subsequent state criminal proceeding. This is especially true when the investigations include potentially incriminating statements from a target. The governing statutory framework lacks any judicial restraints or constitutional restrictions on the collection of evidence by an SIU in an insurance fraud investigation, and similarly, there are no restrictions on the state's use of civil investigations as a context for gathering information to use in criminal prosecutions. As gleaned from its annual reports, the OIFP relies heavily on the evidence presented by an SIU during its investigation through its referral program. State investigators, therefore, appear to retrace the evidentiary steps laid out by the SIU investigator in per-

forming their own ‘investigation’ into the allegation of fraud. The OFPA and case law is silent regarding the legitimacy of such actions.

In many cases, the state may believe it has enough evidence to indict a provider based solely on what is contained in an SIU investigative file. Problematic, however, is that those investigations may only focus on obtaining evidence of a fraud, including some un-counseled and incriminating statements or admissions given by the provider with no knowledge that the information could be used in a criminal prosecution, as opposed to a balanced investigation required of law enforcement. Counsel should attempt to put into place checks at the SIU investigation stage to protect a provider’s rights in any possible subsequent criminal proceeding.

Insurance company investigators, ultimately acting on behalf of the state under the auspices of the IFPA, are not held to heightened constitutional standards, creating the possibility for abuse. To combat this lack of protection, counsel for medical providers should be aggressive in challenging the outsourcing of such investigations. Furthermore, counsel should seek judicial review of the original collection of all evidence gathered during the investigative phase. In particular, counsel should force a court to scrutinize the state’s use of and reliance upon SIU investigative files in connection with any insurance fraud prosecution to potentially weed out any evidence obtained in ignorance of an individual’s right to due process.

Routine checks and balances in DYFS proceedings are again illustrative. In DYFS investigations, records and reports of child abuse must remain confidential but for an allowance for disclosures only in “specifically enumerated circumstances.”<sup>11</sup> One such circumstance is the release of records and reports by DYFS to the “police or other law enforcement agency investigating a report of child

abuse or neglect.”<sup>12</sup> Recognizing the significant potential conflict arising from a Title 9 civil action and a subsequent criminal prosecution, the Legislature has, however, specifically barred any statement that DYFS obtains in a preliminary conference from admission into evidence in a resulting criminal prosecution.<sup>13</sup> A similar protection would be beneficial in the insurance fraud investigation process.

Pursuant to the IFPA, SIU investigations can result in a referral to the OIFP. As such, SIU investigators act as *de facto* OIFP agents. Regulations should require insurers to advise providers of the serious ramifications of any ‘voluntary’ statement extracted during an interrogation. Because of the IFPA’s silence on the issue, counsel must demand that providers should be given no less protection when being interviewed by SIU investigators than by traditional law enforcement. Courts should similarly do the same.

Accordingly, SIU investigators are fully aware that their investigations, including any statements they obtain from a provider, can (and will) be utilized by prosecutors when subjecting a provider to criminal penalties and possible jail time. The state is equally aware that the insurer is required to refer evidence of insurance fraud for possible prosecution. Counsel should, therefore, not sit quietly by and allow the state to enjoy the fruits of an unchecked SIU investigation.

### **Another Problem Lurks: The Use of Statements Made in Settlement Discussions of Civil Disputes to Bolster Criminal Prosecutions of Insurance Fraud**

Generally, insurers attempt to resolve billing disputes with providers. In doing so, open and candid discussions occur between the provider and the insurer regarding the basis of claim submissions and billing practices. During these discussions, and under the belief that they

are attempting to resolve a billing dispute, a provider may unwittingly offer information an insurer believes could be the subject of insurance fraud. Nothing prevents the insurer from referring the matter to the OIFP after the billing dispute is resolved. Thus, revealing a second potential problem with SIU investigations: Provider statements obtained during civil settlement discussions can be used in criminal prosecutions. Even in the context of resolving what, on its face, may be a simple billing dispute, a provider may be exposing him or herself to criminal penalties by cooperating with the insurer in the absence of any constitutional protections.

As most attorneys are aware, N.J.R.E. 408, absent some exceptions, generally prevents use of settlement discussions in subsequent proceedings.<sup>14</sup> An argument could be made, then, that if a statement by an insurer was made in the context of settlement negotiations, it should be barred from use in a later criminal prosecution by N.J.R.E. 408. All counsel should investigate and pursue such a challenge if the facts warrant application.

### **Parting Thoughts for Attorneys Counseling Healthcare Providers Under Investigation**

So what are lawyers representing providers in insurance fraud cases to do? Here are a few suggestions:

First, examine the evidence obtained by the OIFP and determine whether the interviews, and materials were collected independently by that office or were merely compiled by an SIU.

Second, compel the production of documents and policies of the referring insurers to determine how their investigators were trained and to examine the policies and procedures they followed in collecting information, conducting interviews and interrogating providers.

Third, conduct a thorough investigation into the representations the SIU investigators made to the provider prior

to collecting any evidence or obtaining any evidence or statements. Importantly, examine any written agreements or emails sent by the investigators to the provider (or their office) to determine if they accurately represented how the SIU investigator intended to use the information obtained.

Fourth, request information relative to the relationship the SIU has with the OIFP, such as joint training, seminars, reports, and referral patterns. A close reading of the yearly OIFP report is helpful in this assessment.

Fifth, and most importantly, when warranted counsel should challenge the constitutionality of the SIU's methods of collecting evidence and demand compliance with due process.

Insurance fraud and scrutiny placed upon medical providers will undoubtedly continue to grow, attracting a greater share of prosecutorial efforts. Insurers will likely increase and refine fraud investigations to target an ever-growing cross-section of medical providers. As a result, cooperation between state investigators and insurers may further blur the line between traditional notions of law enforcement activities and the collection of relevant evidence. The consequences of this sequence of events would narrow medical providers' constitutional rights. In response, counsel for providers would be wise to arm themselves with a strong understanding of the IFPA and all possible defenses and challenges to the evidence collected. To do otherwise could open the door for the state to outsource a broader array of law enforcement investigations, which cause concern among all counsel. ♪

## Endnotes

1. N.J.S.A. 17:33A-1 *et seq.*
2. N.J.S.A. 17:33A-5(d).
3. N.J.A.C. 10:129-1.1(b)(11).
4. N.J.S.A. 9:6-8.36a.
5. N.J.A.C. 10:129-1.1 to -1.5.

6. [www.nj.gov/oag/dcj/njinsurance-fraud/annual.htm](http://www.nj.gov/oag/dcj/njinsurance-fraud/annual.htm).
7. *Id.*
8. N.J.A.C. 10:129-2.1.
9. N.J.A.C. 10:129-2.1(b)(2).
10. N.J.S.A. 9:6-8.36.
11. N.J.S.A. 17:33A-9a(1).
12. *Id.*
13. *Id.*
14. N.J.R.E. 408.

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