

Abbey

Call a lawyer, call somebody, call somebody who does this all the time. Our team is great. Lots of firms have great teams of people who know how to navigate these situations and can talk to you for an hour.

00:10

You're listening to Bridge the Gap, Season five, A podcast dedicated to informing, educating, and influencing the future of housing and services for seniors. Powered by sponsors, Accu Shield, Connected Living. Hamilton CapTel, Inquire one Day LTC reit. It's never too late. Meridian Capital Group. Salinity the Bridge Group Construction and produced by Salinity Marketing.

Lucas 00:33

Welcome to Bridge the Gap podcast, the Senior Living podcast with Josh and Lucas. A very important topic on today. We wanna welcome Waller Law and we wanna welcome Abbey ruby and Jennifer Weaver to the program. Welcome to the show.

Abbey 00:49

Hey guys.

Jennifer 00:50

Good morning guys. Thanks for having us.

Lucas 00:53

Very excited to have you on continuing our relationship with Waller. You guys have been incredible supporters of the Bridge the Gap platform and our mission to educate, inform, and influence. It means so much and we enjoy working together to help forward that mission. And today we're gonna dive into some tips on what to do to avoid investigations and problems. And then we're gonna give an overview of the main issues where people can get into trouble, and then what to do if there is an enforcement action at one of your facilities. You know, skilled nursing is a very challenging industry. It's also a very different than the traditional senior living industry where you have assisted living in memory care. A lot of people get those two things mixed up, but skilled nursing is its own thing. It has its own unique challenges that individuals face. Jennifer, as we get started, or just before we get started into some of these topics, let our audience know some of your background and then we'll dive in.

Jennifer 2:00

Sure. So I am a partner at Waller in the Nashville office, and I am the co-chair of the healthcare industry team here. So my practice for the past, you know, 20 some odd years, has been representing healthcare providers in all their dealings with the government. And so defending providers who are caught up in government investigations, both civil and criminal. Those are normally false Claims Act investigations. So whistleblower claims brought on behalf of the government and a lot of work doing Medicare audits and appeals, defending providers who are hit with UPIC audits, which are a special breed of audit that can result in multimillion dollar extrapolated overpayments. That's kind of, you know, that's my bread and butter. That's what I love doing, is working with providers, helping them get through, you know, some scary times in their business and get them through to the other side so they can focus on growing their business and providing excellent patient care and to kind of go back to doing the work that they love.

Lucas 3:09

That's amazing. Abbey ruby, give us your background as well and then we'll get into some of these topics.

Abbey 3:16

Yeah, so I'm a partner in our finance and restructuring group. I co-lead that group. I mostly represent lenders in the skilled nursing industry. We work really closely with providers and, you know, it happens a lot in the buildings that we are lending to, especially in the last couple of years. There's just been increased government scrutiny, conversations around it. Work really closely with Jennifer and her team here and thought it would be an interesting perspective to share.

Lucas 3:48

Well, we agree so much. You know, Josh, you and I are oftentimes on the front lines of telling these amazing love stories inside the communities and the people behind the communities, you know, but then oftentimes we want to dive into some actual big issues and big challenges that are very complicated. And this is one of them. Jennifer, start us out by walking us through some of these government enforcement actions and the things that that your background has taught you and what you're seeing currently today.

Jennifer 4:19

Sure. So just kind of the basics. And, and I will preface it by saying that if you're in healthcare, no matter what the sector, with the limited exception of maybe something like cosmetic surgery, you are dependent on federal healthcare programs. And that means that it's just sort of part of the cost of doing business is dealing with government enforcement actions. And that can come in many forms. And so whenever my clients are discouraged and scared when this happens to them, I said, "You know, just go ahead and Google OIG CIA and that stands for Corporate Integrity Agreement. You'll see that virtually everyone in the healthcare industry is either currently subject to a Corporate Integrity agreement or at some point will be. And so you're in good company. The basics of the most common enforcement tool that government has is the False Claims Act, the Federal False Claims Act. And that is a statute that dates back to the Civil War. It's called Lincoln's Law sometimes, and it allows whistleblowers to bring claims on behalf of the government, that false claims were submitted to the government. So it's used commonly for Medicare, Medicaid, federal healthcare programs. And then the government can decide to take those over, investigate those whistleblower allegations. So that's what's very common in terms of, you know, the audience we're talking to now.

Jennifer 5:43

It's funny, sort of funny, that right before the pandemic hit in March of 2020, early March of 2020, Department of Justice rolled out a national nursing home initiative. And that was really focused on coming at nursing home providers and bringing fraud cases and False Claims Act lawsuits on the theory that nursing homes were providing such substandard care that it amounted to no care at all. So they were billing for services that are like worthless services that are effectively not rendered. And that was a little bit of a shift because the focus, the government focus, in prior years had been more on therapy and you know, billing for more therapy services than were needed. And so this came out, like I said, right at the beginning of 2020, the National Nursing Home Initiative. So the focus on substandard quality inadequate staffing, poor infection control, you know, lack of adequate nutrition and use of physical restraints or chemical restraints, those were the things that they were looking at. Within two weeks of

them rolling that out, the Department of Justice, of course we all know it happened. The pandemic hit, it hit the nursing home industry with the greatest force of all. And, you know, everything was sidelined as we scrambled to keep residents alive, get everyone through to the other side.

Jennifer 7:23

And so, you know, it really just sort of faded into the background. But what we've seen as we come out on to the other side in the past, you know, I've seen it in my practice really since the beginning of 2022, that the Department of Justice is back up and running. They gave providers a break, which we all appreciated. And so there wasn't a lot of onsite audit activity, obviously, and enforcement as we tried to get the healthcare industry through the pandemic, but they're back now. Then enforcement activity has scaled up significantly. And I can talk about a couple of cases that have rolled out recently that give some good examples of Department of Justice, you know, going back to the National Nursing Home Initiative that they had rolled out right at the beginning of the pandemic. And finally getting, getting to that.

Josh 8:25

So Jennifer or Abbey, this is obviously a very complex, I'm sure, issue or issues to unpack. But before you get into a specific example, I want to have you guys kind of dumb this down for me, specifically. I'm sure our listeners are tracking very much better than I am, but you mentioned that these false claims and you mentioned the term whistleblowers. So for a provider how are these allegations, I guess would be maybe a term that we could use? How, how do these claims get to the point of where there's an investigation? Is this an employer? Is this a family? Can it be both? I mean, how does it get to the point where this is reported?

Jennifer 9:13

Sure. So the way that it works under the False Claims Act statute is that the whistleblower, which is called a relater, it files a lawsuit under seal. So the provider doesn't know and they usually won't know for some time that they're subject of one of these lawsuits, False Claims Act lawsuits. At the same time it's filed under seal, the whistleblower meets with the government, provides all of the evidence that they have, and the government then initiates its own investigation to decide whether to proceed. So who are these whistleblowers, relaters, most often they're gonna be a disgruntled former employee or sometimes current employee. You know, I've had so many cases where it's someone who was passed over for a promotion, really felt that - a lot of times they're good employees, they're smart people, maybe overqualified for the roles that they're in. They feel like they're not taken seriously, having their concerns taken seriously by their supervisors. When they raise concerns within the organization, they feel, so maybe those were swept under the rug, and if that will be the genesis of a lot of these but there are, and especially in the nursing home side, you will see patient family members bringing cases because the way the False Claims Act work, if you're the whistleblower, you share anywhere from 15 to 30% of the government's recovery. And some of these cases are a hundred million dollar, \$500 million, they're huge recoveries. And so you see situations where a whistleblower walks away with tens of millions of dollars, which is much more lucrative than than a medical malpractice case. So I think of this as like medical malpractice on steroids. It would, especially with these worthless services type cases where, you know, the traditional False Claims Act is, like I said, it was a Civil War statute that you, a federal government contractor, contracted to provide ammunition or supplies to support the war effort, and then they just don't do it. And so the, and they bill the government for services that were never provided for, goods never provided. Here there's no, it's not when you take the theory of worthless services, it's not that the services weren't provided, the allegation is that the care provided was substandard from a clinical perspective. So much so that it might as well have been as though no services were provided.

Josh & Lucas 12:06

We're taking a break in our scheduled show to tell you about exciting opportunities for you to be featured on the Bridge the Gap Network. Click on the show notes to schedule your call with Josh and Lucas. Yeah, what he said.

Josh 12:19

So you know, part of our mission is to provide this type of information to our listeners in order to educate them and influence positive outcomes. So what would be a recent example that you could give, something tangible, a tangible example of something like this taking place recently to our listeners?

Jennifer 12:42

Sure. So a couple of cases that have, you know, been brought out from Under Seal recently in June of 2020, this year, 2022 the Department of Justice filed a False Claims Act case in Pennsylvania against American Health Foundation in three affiliated nursing homes for allegedly providing grossly substandard nursing services. And so this is what we were talking about, the theory that the government is proceeding upon, and this started with a whistleblower complaint, a former employee, and the government intervened, the complaint was unsealed in June of this year, and it's that worthless services theory. So what the government alleges in its, I think it's about almost 200 page complaint in that case, is that the defendant's, American Health Foundation and its affiliated nursing homes, had extremely inadequate staffing. So much so that residents were really not receiving care of any kind of quality, poor infection control and then chemical restraints or the overuse of medication to restrain residents. And that's part of the idea that you're not gonna pay for a labor force to take care of patients, so we'll just drug them instead. And that's the government spin on this. And I'm sure that the case is gonna be defended vigorously, and they will have strong defenses and take issue with the government's allegations. So, but those are the allegations. And what's interesting to me is how much the government really rely on data mining in building this case, a very complex case. And the data they mine came from state surveys and from, you know, CMS, their quality metrics that CMS has on nursing homes. So, you know, the STAR system and to really what the government's argument is in this case is that American Health Foundation was on notice and knew about these issues that they had. They had been visited time and time again by state surveyors who had put them under plans of correction, pointed out all of their issues, that they didn't fix those issues as they arose. They knew about their CMS rankings and the CMS data. They had their own consultants that they brought in who advised them about some of these issues. And so, you know, one thing we didn't mention in the False Claims Act, you have to show intent. So it's not just that you submitted a false claim, but you did so knowingly, that's often a defense. Intent doesn't mean intentional, like you know that this is false, It can also mean reckless or acting with deliberate ignorance to whether a claim is true or not. So I think the government's theory here is that the American Health Foundation, its nursing homes, acted recklessly in the face of all of these red flags and issues that have been brought up over the years and not really taking that seriously and taking corrective action appropriately in response to that.

Abbey 16:10

I'll say one thing that I found so interesting about this case, right? I don't do investigation stuff, but what really stood out to me in this one is the mention of staffing, right? As we were together in Nashville at your conference, The Dream Again Conference, as we were at NIC this fall, as we're working every day with owners and operators of facilities, that is the number one thing that I hear mentioned. I know that's not unique just to this industry, but I feel like we're in this pattern where it happened with COVID, it's

happening with staffing, it's happening with supply chain. Whatever's happening in the broader economy is happening, like Jennifer said, it will, on steroids for senior living. And the staffing concern, I think is something that is so real. It is on everyone's minds. It is a real challenge. And it's something though that you can't just ignore. You have to really figure out a way to address it, because it can have these real implications, both for your resident and your patient care, but also if you're a provider that's accepting government payments - Medicare, Medicaid - it could cause real problems for that as well. So that's what really stood out to me from that case. And I think, Jennifer, there's other cases that they all focus on the same topic.

Jennifer 17:23

Yeah, and, and you're right, Abbey, I mean, staffing, post COVID, finding nursing staff in particular post COVID, has been just a massive issue for healthcare providers across all the sectors, but skilled nursing especially. And you know, another example just from this, from August of this year the government, and again, part of this national nursing home initiative, filed criminal charges against a pair of nursing homes and the owner of the nursing homes, the director of nursing and employees. And it was, again, it was staffing, in this case, the nursing homes, according to the allegations, which are just that. And so the government has to prove its criminal case beyond a reasonable doubt. But their allegations in the indictment are that the nursing homes and their owners and employees falsified staffing records and gave those to state surveyors to convince them that they had adequate staffing when they really didn't. And so obviously, you know, like I said, everyone is facing this challenge according to the government. That's how this group of nursing homes dealt with it, which obviously is not advisable and led to some huge issues that they're gonna face. And I think from all indications, everything I've seen in my work, that it's just ramping up. And so there's, I think the government, the Department of Justice sort of put things on hold during the pandemic, and they have a huge backlog, and they're starting to roll out those investigations now. We're seeing a really big uptick. And it's gonna be for skilled nursing, for the nursing home industry, I think you're gonna see two things. It's gonna be this worthless services, substandard care, theory of False Claims Act Liability, and then also fraud cases. The government's gonna bring fraud investigation based on COVID era relief programs, because so much money flooded out the doors. And wherever there's a floodgates of federal money, the False Claims Act case is followed. And you know, it's, again, you have people, you have staffing issues that also leads to more, I just, it creates a heart, a tensor, more stress felt environment a lot of times for employees. So if you're working in a nursing home and you're dealing with staffing challenges, it makes your job all the more challenging. Those are the fertile grounds, when you have employees in those environments that will lead to, you know, that kind of breeds potential whistleblowers.

Josh 20:16

So I've got a question, and this is probably a, you know, I don't, this may be an unfair question, but maybe just an opinion. How many of these cases, so to speak, or these charges, allegations, do you think are valid, legit? Or is it really being inflated, this uptick, by the potential money that people have to gain off of pulling, either pulling this money back to the government, or whether it's the families or people that feel like they have something to gain by making an allegation? Do you have any read on that?

Jennifer 20:59

Yeah, I mean, it's always a mix. And so, you know, in my career, having defended healthcare providers in False Claims Act matters, one, they're driven to a large extent by the whistleblowers. Some cases the government brings on its own. And so, you know, a lot of times a whistleblower might bring a case to the

government, the government investigates, it's under seal, and they're getting a very skewed view of what really happened before I get involved and can try to educate the government lawyers who don't always know a lot about healthcare, sometimes they do, but I deal with a lot of prosecutors that have no idea how the healthcare industry works. And if they've been listening to a misinformed whistleblower for a year, then it's hard to kind of disabuse them of some of the ideas that been put in their head. When I come in, and the way that I normally, and the provider note learns about a False Claims Act investigation, is the government will serve a subpoena or a civil investigative demand, a request for usually massive amounts of documents and data. In extreme cases, they'll serve search warrants, and you find out that way that you're under investigation. But that's when the lawyers get involved. That's when I come get involved, start having those discussions with the government about, you know, what are the concerns? What are you looking at? Always we wanna cooperate, we wanna understand if there's something that we're not doing correctly, that we wanna address it. You need to stay on good terms and maintain credibility with the government. I'll do my own internal investigation. And, you know, sometimes I go in with my team and we investigate the allegations, what we think the government's concerned with, we find there might be an issue, we find there might be, you know, that they did have some quality control issues, some infection control issues, that there might have been incorrect billing. In that scenario, I identify a cabinet, meet with the government, try to come up with resolutions that are fair to my client. That, I mean, when you're a healthcare provider, if you received government funds in error, if you received an overpayment, you weren't entitled to, I don't have any argument or defense for keeping that, like you need to pay it back. The government in False Claims Act cases, the statute allows for trouble damages plus penalties. When I settle cases, I generally settle for one and a half or two times damages. That's kind of the standard DOJ settlement structure. And there might be, again, the requirement to enter into a corporate integrity agreement with the OIG that is anywhere from three to five years, generally. That will be some sort of enhanced compliance oversight by the government. So if they owe money, if there's an issue, then we fix it. We make sure the government knows that we've taken corrective action. We try to work out a resolution so that my client can move forward. When I do my internal investigation and it looks like the whistleblower is just, you know, misinformed giving the government faulty information, then my job is to go in and convince the government, "You don't need to be, in this case, you need to decline this case. My client didn't do anything wrong. They're running an excellent operation. They're fully compliant, they have providing great quality of care, and so you need to just step away from this." And so it really just depends.

Abbey 24:53

Well, and Josh, I think from, from my perspective, it sort of comes back to that same point of like, once you are in skilled nursing, everything is just amplified. I don't know any industry that accepted government funds during the pandemic that is not now under scrutiny of the use and application of those funds. It's all of them. There's nothing special about skilled nursing or senior care facilities that misused those funds more or differently. Instead, I think that there's just this amplified view. There are so few topics in the world that we can all agree on, or in America, that we can agree on. I can think of like two. And one of them is probably that everyone agrees we should be providing great care for our seniors. And so it's a really easy political point too, that you end up with people on both sides of the aisle finding a way to agree to say, "Yes, we should be doing more. We should have oversight. We should be making sure that every licensed operator of a senior care facility is providing great services." And what are the ways we can do that? One of them is through these investigations with the DOJ. Another one is actually just last week, CMS, which is the Center for Medicare & Medicaid Services, just announced that it's gonna start increasing its scrutiny of low performing nursing homes by revising its special focus facility program, facilities can expect to stay on the list for longer. There might be increased follow up

after. And one of the things that CMS specifically called on states to consider is a facility staffing level in determining which facilities go on that list in the first place. So again, it's coming back to that issue that affects the entire economy. It's just that in this segment it's greater.

Josh 26:39

Yeah. So, wow, what a, this is a heavy topic, and I'm sitting here, Lucas, thinking, "Oh my gosh, some of our listeners right now?" They are on their morning treadmill having a wonderful morning, feeling like really upbeat right now, and all of a sudden they're thinking, "Oh my gosh, what am I about to get hit with? Am I going to be subject to one of these?" Well, we have some encouragement, thankfully, there's wonderful pros out there like from Waller that can walk them through if they do face these circumstances. But as we start to round out the show, Jennifer and Abbey, some good practical and more of a positive takeaway, some things that our listeners, those providers, those operators can do to maybe help prevent or if they find themselves, what are the first things they need to do if they find themselves in that situation?

Jennifer 27:32

Compliance is hard. And you know, it's an expense. And when you're running a busy facility or multiple facilities, there's so many things that sometimes seem to take precedent over it. You have other fires to put out before you can get to that. But don't be shortsighted. It always pays to invest in compliance and quality control. It'll save you money in the long run. And, you know, I've seen in my experience at well run compliance programs that are effective, efficient, and implemented correctly, can actually improve operations, improve, you know, kind of billing hygiene and make things run more smoothly. So, number one, invest in compliance. Number two, I always encourage, I mean, you need to be thinking what is a government seeing? And you should always be a couple steps ahead of them if you can. So do your own data analysis. These cases are usually, when the government jumps in, they're looking for outliers. Someone who, when it comes to let's say prescription data, the government has all access and to all Medicare & Medicaid data, they can see who is the outlier in terms of prescribing certain medications that are considered chemical restraints. And so if there's nursing homes that stand out, they're gonna get targeted. So do your own data analysis, see where you fall with respect to your peers on the CMS quality rankings. Pay attention to your state survey. Make sure that when issues are identified in state surveys, they're dealt with appropriately and have a good, make sure that your employees know and you have policies in place on how to respond to surveyors and handle those interactions in the best possible way.

Abbey 29:30

And this might feel like weird promotion of our law firm. It's not just us, call a lawyer, call somebody, call somebody who does this all the time. Don't call me. I don't do this all the time, but somebody, somebody like Jennifer, like our team is great. Lots of firms have great teams of people who know how to navigate these situations and can talk to you for an hour and give you good advice and set you on the right course. I think that there are people who, when this stuff happens, the last thing they wanna do is run up a bill or make a bigger deal out of it than they think it needs to be. And they'll just respond - don't do that. Call somebody. I'd also say, I am sort of a unique perspective because I work with lenders and investors and these other people in the industry. Tell them too, no one that you are partnering with for funds or staffing or for the success of your facility should ever be blindsided by this. They shouldn't hear about it in a press release, right? I think that there's just good common sense ways that if this happens, cuz it might, you can absolutely navigate it in a positive way and it doesn't have to be so scary.

Josh 30:39

Well, Lucas you know, I don't know about you, but this makes me very grateful to have great partners and how important it is to have great partners and great teams that you surround yourself with and caring for, you know, these very valuable people, the teams and the residents. And I don't know about you, but you know, Lucas, I've got this just growing respect for the operators and all the challenges that they face on a daily basis.

Lucas 31:11

I couldn't agree more. And we really appreciate your time, Jennifer and Abbey, over at Waller there in Nashville, Tennessee. What a great topic. Very interesting conversation. And for those of you that wanna learn more, you can go to the show notes right now on your podcast player and you can connect with Waller and Jennifer and Abbey as well. You can go to btgvoice.com and access all of our content there. Connect with us on social and be a part of the conversation. This has been a great conversation. Thank y'all for your time and thanks to everyone for listening to another great episode of Bridge the Gap.

31:48

Thanks for listening to Bridge the Gap podcast with Josh and Lucas. Connect with the BTG network team and use your voice to influence the industry by connecting with us at btgvoice.com.