

CLIENT ALERT

Part Two: The Impact of the DOJ's Directive on the Manner in Which COVID-19-Related Fraud Actions Are Being Brought and Framed

APRIL 9, 2020

In [Part One](#) of our series, we offered a broad overview of how the U.S. Department of Justice ("DOJ"), other federal and state agencies, and the courts are responding to the current coronavirus ("COVID-19") pandemic. We also discussed the first civil enforcement action that the DOJ filed against COVID-19-related fraud.

In Part Two, we examine what are likely the first criminal actions that the DOJ has brought targeting COVID-19 fraud. We further offer thoughts on how the government may be reshaping its ongoing fraud investigations to focus on any COVID-19 component of the fraudulent schemes as a way to demonstrate the new law enforcement priority.

Ongoing investigations that commenced prior to the coronavirus crisis are likely being assessed on the basis of whether the conduct at issue now touches upon our existing global health crisis. Those that do will be brought to a head with the filing of criminal charges far more quickly than others. Further, any originally contemplated charges may be supplemented with charges that focus on the impact of the alleged wrongdoing on the global health challenges, and the charging instruments and related press may be additionally framed in that manner. Finally, depending on the press tactics taken by the government during these volatile times, defense counsel will have an even more difficult time than usual combating the potential for unfair prejudice to defendants that results from the government's public statements regarding their cases.

COVID-19 INVESTMENT FRAUD SCHEME IN CALIFORNIA

On March 25, 2020, in what is believed to be the first federal criminal case targeting COVID-19 fraud via an undercover investigation, FBI agents arrested Keith Lawrence Middlebrook in Southern California on one count of attempted wire fraud.^[1] According to the complaint, Middlebrook falsely claimed to have developed both preventative pills and an injectable cure for the coronavirus. He allegedly touted his "patent-pending" pills and injectable serum through videos and written statements on his Instagram account and on videos posted on YouTube.

Middlebrook sought investors for two of his companies that would purportedly mass produce and market his creations. The complaint alleges that he told potential investors that once their funds were received, they would receive shares in his companies, Quantum Prevention CV Inc. and Quantum Cure CV 2020, and that they would further receive massive profits on their investments once the pills and serum were produced and marketed.

Middlebrook was arrested while attempting to deliver his pills to an undercover FBI agent who had been posing as a potential investor.

In the DOJ press release, Nick Hanna, the U.S. Attorney for the Central District of California, stated: “During these difficult days, scams like this are using blatant lies to prey upon our fears and weaknesses.” Paul Delacourt, the Assistant Director in Charge of the FBI’s Los Angeles Field Office, added: “There’s a particular opportunistic cruelty in seeking to profit based on the fear and helplessness of others.”

COVID-19 HEALTHCARE FRAUD SCHEME IN NEW JERSEY

On March 26, 2020, the U.S. Attorney’s Office for the District of New Jersey charged Erik Santos with one count of conspiring to violate the Federal Anti-Kickback Statute and one count of conspiring to commit health care fraud.[2] According to the complaint, Santos owned and operated a company that identified and referred individuals who were covered by Medicare to various medical testing companies for medical tests.

From November 2019 to the present, Santos allegedly defrauded Medicare by receiving kickbacks from the testing companies in exchange for steering individuals covered by Medicare to those testing companies for genetic cancer screening tests.

According to the complaint, in March 2020, as the coronavirus pandemic spread, Santos expanded his kickback scheme to include referrals for COVID-19 testing. The complaint describes in detail how the scheme worked with respect to the COVID-19 testing.

In short, Santos bundled the COVID-19 test referral with another, significantly more expensive test referral that neither identified nor aided in the treatment of COVID-19. He then targeted individuals who would likely test negative for COVID-19 and attempted to have them tested by both tests. By doing so, Santos allegedly secured larger kickbacks for himself. As highlighted by the government during Santos’s bail hearing, Santos thus caused limited federal health care resources (*i.e.*, the COVID-19 tests) to be used on asymptomatic individuals who were referred for COVID-19 testing and who would likely test negative for the coronavirus, at a time when large numbers of the population were in dire need of the scarce COVID-19 tests to determine whether they had contracted the virus.

Representatives of the federal agencies responsible for the investigation denounced Santos’s alleged conduct as “despicable pandemic profiteering,” “capitaliz[ing] on others’ suffering to make a buck,” being “akin to receiving blood money,” and “undermin[ing] the government’s response, jeopardiz[ing] medical professionals and endanger[ing] the public.”[3]

KEY TAKEAWAYS

- As we predicted in [Part One](#) of this series, enforcement actions targeting COVID-19-related fraud have commenced quickly in line with Attorney General William Barr’s directive to “prioritize” the prosecution of COVID-19-related crimes.
- Within two weeks of Barr’s announcement, at least three enforcement actions have been filed swiftly, each of which targets a different type of fraudulent scheme related to COVID-19 (namely, website sales of fake vaccine kits; kickbacks for COVID-19-related testing; and investment fraud related to companies purporting to develop a COVID-19 treatment and cure).
- In addition to initiating new COVID-19-related investigations, the government is likely to assess pre-existing investigations and focus its resources on quickly bringing charges related to those that have an impact on the challenges posed by the current global health crisis.
- The focus and the framing of charges will likely be based on those issues that relate to COVID-19, even for investigations that began before the crisis and involve a wide array of other issues.
- Press releases, press conferences, and other government statements regarding COVID-19-related fraud cases have highlighted, and will continue to highlight, the government’s mission to protect the public from such frauds and include statements regarding the devastating impact of defendants’ conduct on vulnerable victims and the

efforts to address this unprecedented global health crisis. These public statements require defense attorneys to develop effective means of addressing the resulting increased risks of unfair prejudice to defendants.

^[1] U.S. Attorney's Office for the Central District of California, *Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure* (Mar. 25, 2020), available at <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>; see *United States v. Middlebrook*, No. 20-mj-1341 (C.D. Cal. Mar. 25, 2020) (Compl.).

^[2] *United States v. Santos*, No. 20-mj-9096 (D.N.J. Mar. 26, 2020) (Compl.); see U.S. Attorney's Office for the District of New Jersey, *Georgia Man Arrested for Orchestrating Scheme to Defraud Health Care Benefit Programs Related to COVID-19 and Genetic Cancer Testing* (Mar. 30, 2020), available at <https://www.justice.gov/usao-nj/pr/georgia-man-arrested-orchestrating-scheme-defraud-health-care-benefit-programs-related> ("DOJ Press Release, *Georgia Man Arrested*").

^[3] DOJ Press Release, *Georgia Man Arrested*, *supra* note 2.

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