

CORPORATE CRIMES IN THE PHARMACEUTICALS INDUSTRY

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Abstract

In this paper the aspects of deceptive advertising and its effects will be discussed as well as the lesser known problem which is an ongoing ethical battle with the physicians of kickbacks. These corporate crimes in the pharmaceutical industry have been dealt with extensively in this paper. Deceptive, misleading and fake advertisement claiming absolute cure is also one of the frequent malpractices being carried out in the medical profession. Kickbacks are the undisclosed commissions which doctors or physicians receive in exchange of prescribing or referring a particular medicine to a patient. What these physicians do not realize or care about is that some medicines- even the patented ones- are not only worthless but harmful.

Health care fraud has failed to capture the attention of the public or the media. There has been renewed interest by political leaders and prominent government officials in raising public awareness of the enormity of the problem. In addition, investigation of health care fraud is fast becoming one of law enforcement's major priorities.

In this paper I will look into

- 1) To what extent do advertising, and deceptive advertising in particular, affect consumption of the advertised good and its substitutes?
- 2) What can be done to reduce medical kickbacks?

Introduction

White collar crimes are characterized by “deceit, concealment, or violation of trust and are not dependent upon the application or threat of physical force or violence. Such acts are committed by individuals and organizations to obtain personal or business advantage”. Health care fraud is a form of white collar crime that may be committed by health care providers, consumers, companies providing medical supplies or services, and health care organizations. There is a trend toward increased participation by organized crime groups in complex health care fraud schemes. There are many different types of illegal and unethical schemes that constitute health care fraud. The common types of fraud committed by physicians include billing for services that were never rendered, providing unnecessary treatments or tests, up coding (billing for a more expensive diagnosis or procedure), falsifying or exaggerating the severity of the medical illness to justify coding, and accepting kickbacks for referrals.

Fake and misleading advertising is yet another area in which the white collar criminals operate. They make illegal and misleading claims of medical cure through advertisements in newspapers, magazines, radio and television thus adding to human misery. Many patent medicines are not only worthless but harmful. Similar advertisements for cosmetics and adulterated food are also widespread in practices which are injurious to public health. These persons may not violate the letter of the law in its spirit but they commit crimes which are anti-social and injurious to public health.

The Oxford Dictionary defines a quack as “a person who pretends to have medical skill or knowledge”. The FDA defines health fraud as “the promotion, for profit, of a medical remedy known to be false or unproven.” It is said that judgments about individual methods should be based on whether or not there is scientific evidence of effectiveness. However, quackery is not confined to charlatans exploiting their victims but also extends to the sale of inappropriate products, or even manufacturers advertising specious products.

Kickbacks on the other hand are worse and inherently evil. In the health care industry consumers rely on the advice given to them by their doctors for their treatment. The product providers therefore compete with each other to influence the doctors or the intermediaries. They do this with the help of kickbacks.¹

¹https://www.jstor.org/stable/pdf/23245434.pdf?refreqid=search%3Ad19e11cab862c55fb05ca7ede18a1636&seq=1#page_scan_tab_contents

Deceptive Advertisement

Deceptive advertising is defined as a firm misrepresenting to the consumer the attributes of the advertised product, and thus the expected utility from using the product. Advertising in general and deceptive advertising in particular can be cooperative, increasing total consumption, or competitive (predatory), keeping total consumption unchanged but increasing market share at the expense of rivals. Advertising can have both effects, increasing the consumption of the advertised product and decreasing consumption of rival products.

The Drugs and Magical remedies (Objectional Advertisements) Act, 1954 was established with the purpose of controlling and prohibiting advertisements of remedies alleged to possess magical remedies. Section 3 of the Act prescribes that no person should take part in the publicity of any advertisement suggesting the use of any drug for procurement of miscarriage, prevention of conception, improvement of a person's capacity of sexual pleasure, correction of menstrual disorder or diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition which are specified in the schedule. Section 4 deals with an advertisement of any drug giving a false impression or making a false claim. Section 5 deals with the prohibition of advertisement of magical remedies that claim to be useful for purposes mentioned under section 3. A person violating these provisions can be imprisoned to an extent of six months on first conviction and one year on any subsequent conviction. These provisions are a clear check on those quacks who exploit the ignorance of people to trick them. People easily fall for such claims of magical remedies being left with no option since their ailment has no definite treatment. The Drugs and Cosmetics Act, 1940 regulates the manufacture, sale and import of drugs and cosmetics. Section 6 of the Act provides for a setting up of a Central Drugs laboratory for testing sample drugs in order to declare them safe. This helps in ensuring that the wrong drugs are not in the market. Section 8 provides for a standard of quality for the drugs and cosmetics, while section 9 clearly defines what

misbranded, adulterated and spurious drugs and cosmetics are in order to recognize such products before they are allowed to be manufactured, sold or imported. Section 10A gives the power to the Central Government to prohibit import of drugs and cosmetics in public interest, while section 13 lays down the punishment for violating the Act in terms of import of drugs and cosmetics. Chapter IV deals with the manufacture and sale of drugs.

Furthermore, in order to check fake medicines, section 26A gives the Central Government to prohibit manufacture etc of drugs and cosmetics in public interest and Section 27 lays down the punishment for violating the provisions relating to manufacture. Thus, the above sections show that the Act looks to do away with quackery from its very foundation by preventing the publication of misleading and false advertisements.

Kickbacks

Kickbacks are undisclosed commissions given to doctors or intermediaries between the manufacturer and the consumer. Product providers generally contact the intermediaries or the physicians offering undisclosed commissions in exchange of the eventual sale of their product. This is a huge concern as the quality of the medicines may be compromised because of the greed of the physicians.

Each firm has the power to steer the physicians advice in their favour by simply increasing the price or commission. The consumer will be unaware of the same and is exposed to the risks of that particular medicine. He becomes a victim to the greed of the physician. This is a breach of a fiduciary relationship. A patient goes to the doctor with the belief that the doctor will act in his best interest and not on self interest. This doctor patient relationship is broken because of this kickbacks.

In the landmark judgement of P.B. Desai V. State of Maharashtra & Ors (2013) 15 SCC 481

The Supreme Court of India held that “The Code of Medical Ethics/Medical Ethics of the Doctors and also formation of Doctor-patient relationship had been discussed in threadbare by the Honble Supreme Court in and held that the formation of a doctor-patient relationship is integral to the formation of a legal relationship and consequent rights and duties, forming the basis of liability of a medical practitioner. Due to the very nature of the medical

Profession, the degree of responsibility on the practitioner is higher than that of any other . The ethical duty to treat on the part of the Doctors is clearly covered by the service provider Code of Medical Ethics, 1972.²Kickbacks can even be called a ‘cut’. When several doctors offer people cuts in exchange of referrals of patients. This way whatever the doctor earns the referrers get a certain percent of the fees. For example, a doctor may offer 60% of the fees to the referrer, so if the fee is Rs. 1000, he gets Rs.600 and the doctor only gets Rs.400. But this way the doctor has a source of income with the new patient. This distorted relationship between doctors and patients have made the

²(2013) 15 SCC 481

patients approach the doctors with mixed feelings of fear and apprehension as they do not know whether the doctors have the best interests at heart. Doctors are known to prescribe unnecessary diagnostic tests, hazardous drugs and inappropriate surgical procedures, all for the kickbacks they receive from the healthcare industry. Medical establishments work closely with drug manufacturers whose main objective is to maximise profits. Their goal is to sell larger quantities of drugs and for that they go to any extent. Doctors are the principal salespeople of drug companies and they are rewarded with research grants, gifts, lavish perquisites and foreign tours. The principal buyers are the public who need to be vaccinated.

There are certain ethical codes which have to be followed by the physicians.

In our model firms compete through commissions paid to an advisor. The advisor issues a recommendation to a customer regarding which of the two products to purchase, basis of private information about the match between the customer's needs characteristics of the products. The advisor is compensated through commissions paid by the firms. In addition, the advisor cares that the customer purchases the suitable product, because of liability, ethical concerns. Firm sets the product prices, taking into account the advice customers receive.

MCI has issued an order in this regard to stop doctors from getting gifts from pharmaceuticals. However, the practice of giving benefits in other forms such as sponsoring a trip for conferences, symposia with full payment of registration fees, travel, stay and lodging in star rated hotels still exists. This leads to the unfair practice of prescribing medicines of the brand they are tied up with the pharmaceutical company. The main reasons that corruption in medicine occurs are lack of information to users, excessive red tape, shortages of doctors and healthcare supplies, poor salaries in the public sector and finally, poor management and supervision. The first step is to provide information

to users about services available as well as their cost. The gulf between healthcare providers and users in India and the trust that is reposed in the generally revered doctor means that a patient will nearly always do what is advised. The second is to strictly monitor all engagements between parties in the healthcare sector, such as between an individual patient and doctor as well as a pharmaceutical supplier and a hospital. All this can be done by the use of electronic medical record systems, using even smartphones. The advantage of electronic records is that they are cheap, portable, accessible and accurate. There is evidence too that not only does the use of electronic records make healthcare more effective, it also reduces the

scope for corruption. There are applications such as Raxa Doctor which help in these matters, they manage the patient health records.

Another way to deal with this problem of undisclosed commissions is to change the company or the hospital policy in a way which would disclose the side effects of each drug prescribed to the patients. This way the patients will be making an informed choice instead of blind faith.

The government being a welfare state has to protect the citizens from just instances and make the system stronger. National watchdogs like Britain's National Fraud Authority can be created, which has brought down corrupt practices in the National Health Service. Finally, once he or she is caught, the corrupt doctor or health worker should be subjected to exemplary punishment.

The problem of governance issues between the Government of India and MCI still exists. Although MCI is an autonomous regulatory body for medical education, it needs to have a cordial relationship with the Government. However, in absence of such a relation the erstwhile UPA Government of India drafted a new bill to replace MCI in the form of a National Commission for Human Resources on Health. The bill could not be passed due to rejection by the Parliamentary standing committee on health. Under the current circumstances, MCI reigns supreme and it all depends on the attitude of the office bearers to regulate medical education in India.

Physicians often erroneously believe that ~~kickback~~ kickback is illegal but that gifts, sports tickets, dinners or other forms of appreciation are acceptable. The truth is that whatever the form a kickback takes, it's not good for your reputation or the medical profession.

CONCLUSION

Health Care Fraud is expected to continue to rise as people live longer. This increase will produce a greater demand for Medicare benefits. As a result, it is expected that the utilization of long and short term care facilities such as skilled nursing, assisted living, and hospice services will expand substantially in the future. I believe the main reasons that corruption in medicine occurs are lack of information to users, excessive red tape, shortages of doctors and healthcare supplies, poor salaries in the public sector and finally, poor management and supervision. Its vast scale means that the corrupt can be fairly certain they will not be found out, let alone punished for their misdeeds.

The Drugs and Magical (Objectional Remedies) Act,1954 has reduced the probability of deceptive advertisements and also makes sure that all the drugs in the market are healthy and safe and that all the side effects are disclosed completely. Kickbacks on the other hand will be harder to get rid of as they are done under the table in a clandestine manner and in private hospitals. Therefore The government has to become more vigilant in this area.

