

FIGHTING BACK HEALTHCARE PROSECUTIONS AND AUDITS

**Bill Sutton
Greenberg Traurig, P.A.
450 S. Orange Ave., Suite 650
Orlando, Florida 32801
Phone: (407) 420-1000
Fax: (407) 420-5909
E-mail: suttonb@gtlaw.com**

I. INTRODUCTION

Resources dedicated to the detection, investigation and prosecution of health care fraud and abuse are at unprecedented levels. The Health Insurance Portability and Accountability Act of 1996 provided additional funding for health care enforcement activities. Moreover, the use of criminal and civil statutes traditionally used to combat organized crime (e.g., RICO, Money Laundering, Mail and Wire Fraud) are now being used against persons and organizations who allegedly submit false, fraudulent and abusive claims for services rendered. Finally, the number of whistleblower (“*qui tam*”) lawsuits filed under the civil false claims laws continues to increase, placing health care providers at great risk given the heavy monetary penalty provisions contained in these statutes.

II. DEFINITIONS

A. Fraud

An *intentional* deception or misrepresentation made by a person with the knowledge that the deception results in an unauthorized benefit to himself/herself or another person.

B. Abuse

Provider practices that are inconsistent with generally accepted business or medical practices and that result in an unnecessary cost to publicly-funded healthcare programs or in reimbursement for goods or services that are not medically necessary or that fail to meet professionally recognized standards for health care.

C. Medical Necessity

Any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice.

III. REGULATORY, INVESTIGATIVE AND PROSECUTING ENTITIES

A. Federal

1. Medicare Intermediaries (Part A) and Carriers (Part B).
2. Office of the Inspector General, U.S. Department of Health & Human Services.
3. Federal Bureau of Investigation.
4. Drug Enforcement Administration.
5. Criminal Investigation Division, Internal Revenue Service.
6. United States Department of Justice.

B. State

1. Medicaid Program Integrity Units
 - Housed in state Medicaid agencies
 - Essentially perform medical record audits and claims review to determine whether claims meet “payment criteria.”
2. Medicaid Fraud Control Units (MFCU)
 - Normally housed in state Attorney General’s Office or state police agency.
 - MFCU responsibilities include: (a) investigate allegations of billing fraud occurring in state Medicaid program; and (b) investigate alleged abuse or neglect of patients in health care facilities (i.e., nursing homes) receiving Medicaid payments.

3. Local Prosecuting Attorneys

Particular titles differ depending on state (e.g., District Attorney, State Attorney, District Attorney General, County Solicitor).

Primarily interested in “slam dunk” cases (i.e., cases involving “phantom” billing operations”).

IV. THE CHALLENGES FACING PROVIDERS

- A. The “Bureaucratization” of Medicine
- B. Criminalization of Coding, Billing and Coding Standards
 - 1. “If it’s not documented, it didn’t happen.”
 - 2. Coding and documentation errors commonly used as basis for criminal prosecutions and civil fraud actions.
- C. Government’s “Scorekeeper” Mentality
 - 1. Need to maintain publicity regarding large monetary recoveries.
 - 2. Scorekeeper mentality clouds investigative objectivity.
- D. Government lawyers and agents who do not understand the healthcare system.
- E. Government Intimidation Tactics
 - 1. Execution of search warrants by government agents.
 - 2. Use of criminal statutes (e.g., RICO, Mail Fraud and Money Laundering) designed to combat organized crime against healthcare providers.
- F. “Clubby” relationship between defense counsel and prosecutors?

V. CIVIL FALSE CLAIMS LAWS: A BRIEF PRIMER

The Federal Civil False Claims Act and several state false claims laws allow the government to bring civil lawsuits against persons who submit false claims for payment to government-funded programs. Moreover, these laws provides that private whistleblowers, also known as *qui tam relators*, may file such suits on behalf of the government and share in any proceeds obtained through settlement or judgment. Finally, the federal and virtually every state false claims law contains severe damage and monetary penalty provisions which effectively punish persons found liable under either statute.

- A. What is a *claim*?
 - 1. Any request or demand, under a contract or otherwise, for money, property, or services made to any employee or agent of the government. 31 U.S.C. § 3729(c).
 - 2. An actual “claim” is the Health Insurance Claim Form (HCFA Form 1500), not each payment code contained on the claim form. *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997).
- B. What is meant by *False*?
 - 1. Question of “Falsity” may be based on the interpretation of a regulation, contract, or agreement, or state or federal law. Most courts hold these are questions of law to be decided by the court. See *United States ex rel. Berge v. University of Alabama*, 104 F.3d 1453 (4th Cir. 1997).
 - 2. A statement, to be actionable, must be false under any reasonable interpretation. *United States v. Adler*, 623 F.2d, 1287 (8th Cir. 1980).
 - 3. Whether claims are false must be viewed from the common-sense reasonableness of a defendant’s interpretation of requirements or regulations. See *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992).
- C. Intent Standard under the False Claims Laws
 - 1. Standard of “Knowing” or “Knowingly” defined as:
 - a. Actual knowledge of the falsity of the claim;
 - b. Deliberate Ignorance; or
 - c. Reckless Disregard.
 - 2. Though the false claims laws make clear that the government does not have to prove that the defendant *intended* to commit fraud, the government must prove ***more than a mere mistake or negligence***. *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996); *Hindo v. University of Health Sciences*, 65 F.3d 608 (7th Cir. 1995).
- D. Penalties under the Federal Civil False Claims Act (31 U.S.C. § 3729).
 - 1. Treble Damages (i.e., three times the amount of improper bills)
 - Multiplier is automatic and non-discretionary.
 - Damages *can be reduced* upon voluntary disclosure of false claims violations.
 - 2. Monetary Penalties
 - \$5000 to \$10,000 per false claim.
 - Debt Collection Improvement Act of 1996 allowed U.S. Department of Justice to make “inflationary adjustment” to the monetary penalty provisions of the Federal Civil False Claims Act.

As a result, the DOJ adjusted civil false claims monetary penalties to \$5500 to \$11,000 per false claim. *See* 64 Federal Register 47099-47104 (August 30, 1999).

3. Disproportionate fines and penalties may violate the Excessive Fines Clause found in the Eight Amendment of the U.S. Constitution. *See United States v. Mackby*, 243 F.3d 1159 (9th Cir. 2001); *United States ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71 (E.D. Mich. 1993).

E. False Claims Pleading Requirements

1. Federal Rule of Civil Procedure 9(b) and virtually all state procedural rules *mandate* that allegations of fraud must be plead with particularity (i.e., the who, what, where, when, and how of the alleged fraud must be spelled out in specific detail).

2. Federal Rule 9(b) pleading requirements apply to civil false claims actions. *See U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002).

3. Government must spell out allegations of alleged false, fraudulent or otherwise improper billing in specific detail (e.g., identify each improper claim and explain why it is false or fraudulent). Failure to do so subjects the suit to a motion to dismiss.

VI. WHAT YOU CAN DO TO FIGHT BACK

A. Preventive Measures

1. Get questions to government answered ***IN WRITING***.
2. For answers given verbally (i.e., over the phone), write down the name, job title and contact information for the person who provided the answer.
3. Consider some moderate compliance or auditing activity.

B. Ask for all audit documentation utilized by government.

1. Government auditors usually prepare set of audit “worksheets” which should be provided upon request.
2. Request copy of all regulations, guidelines, policies and internal memos used to provide “guidance” during the audit process.

C. Challenge institutional assumptions.

1. “That’s the way we’ve always done it.”
 - Institutional “groupthink” seldom supported by law, regulation or agency policy.
 - Usually signals attempt by payer or agency to discourage further inquiry or difficult questions.
 - Demand copy of ***SPECIFIC*** law, regulation or payer policy supporting decision to deny or adjust claim.
2. “If it’s not documented, it didn’t happen.”
 - Relieves auditors and investigators of performing a more complete, even competent, inquiry of billed claims.
 - External evidence of patient care (e.g., what does the patient say about the care provided) is powerful evidence mitigating against finding that deficient documentation equates to service never being provided.

D. If under investigation, ***DO NOT*** engage government auditors, investigators or attorneys without speaking to your lawyer or without your lawyer present.

1. Must determine what “type” of investigation or audit is occurring (i.e., routine licensure or quality audit, billing integrity audit, or civil/criminal fraud audit).
2. Government agents will frequently attempt to take words or statements out of context, or leave out exculpatory details.

E. Disgruntled Employees

1. Today's disgruntled employee is tomorrow's government witness.
2. Should deploy "exit interview" strategies which include having the employee sign a statement indicating no knowledge of false or otherwise improper billing, or to detail instances of illegal or otherwise improper activity.
3. Contact legal counsel when separating "problem" employees.

VI. WHAT SHOULD YOUR LAWYER BE DOING?

A. Aggressive Motion Practice

1. At the start of case, avoid repeated "preliminary" meetings or ongoing "settlement" discussions with government lawyers and investigators. After an initial meeting, these follow-up meetings rarely produce any benefits.
2. Avoid submission of "thought pieces" to government counsel explaining why they are wrong. Government counsel will not read these papers in their entirety and will probably ignore them altogether. All initial attacks on government's case should be in the form of a motion to dismiss.
3. Initial arguments attacking the legal sufficiency of the government's case (e.g., the government fails to plead fraud, false claims or other improper billing allegations with the requisite degree of specificity required by the law) should be made in a motion to dismiss and argued to the court.

B. Retain a **QUALIFIED** Expert to Evaluate Government's Findings

1. Initial engagement should be limited to a sample review of claims denied by government for payment.
2. Expert should focus on:
 - Whether government was too aggressive in audit or review;
 - Was government following its own payment policies; and
 - Did the government *underpay* for services rendered.

C. Thorough Case Investigation

1. In cases involving allegations of criminal and/or civil fraud or false billing, consider retaining an experienced professional investigator to handle investigate duties. Professional investigators are generally less expensive than law firm associates, and are usually more skilled at conducting interviews and gathering background information on potential witnesses.
2. Avoid using law firm associates (typically younger lawyers) to perform investigative duties. This is not an efficient use of resources and will generally not yield the best results.
3. There is no substitute for a thorough investigation of the facts. Generally speaking, the facts, not the law, win cases.

D. Aggressive Discovery Practice

1. Counsel should immediately initiate discovery against government with a view toward identifying:
 - The *specific* claims that are improperly billed;
 - The *exact* law, regulations or policies which dictate that the claims are wrong;
 - All individuals (including expert witnesses) who will testify on behalf of the government and the content of their testimony; and
 - All *relevant* documents in government's possession.
2. Counsel must also carefully evaluate government discovery requests and seek court protection when government lawyers engage in oppressive or abusive discovery practices.

F. Prepare with a view toward trial.

1. Best way to achieve favorable settlement options is to prepare as if case is going to trial. This will force government to take a hard look at the merits of their case, and possibly cause them to reevaluate any initial settlement demands.
2. Throughout the course of discovery and case preparation, counsel should keep you apprised of any new developments, and continually reassess the relative strengths and weaknesses of the case.