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Hospice Whistleblowers and the False Claims Act: Part I

Over the past several years, hospices have faced an increasing number of lawsuits under the federal civil False Claims Act (FCA). The FCA is just one of the many laws in the federal government's arsenal against perceived fraud and abuse in the Medicare and Medicaid programs. However, the FCA receives a great deal of attention in the health care community because it allows private parties (often referred to as "whistleblowers," "relators" or "qui tam plaintiffs") to initiate lawsuits alleging Medicare or Medicaid fraud on behalf of the federal government. The law provides whistleblowers with a substantial financial incentive to initiate these lawsuits, as they may receive up to 30% of any amount that the government recovers from the provider, depending on the whistleblower's role in the case.

Many hospices are unfamiliar with the FCA and how it could affect them. Historically, hospices have faced few FCA lawsuits compared to other types of health care providers. As a result, some hospices may think that only hospices with egregiously fraudulent practices would face lawsuits under the FCA. However, the number of hospices facing FCA lawsuits has been increasing over the past several years. At the center of these cases, whistleblowers are alleging that the hospice is admitting or retaining ineligible patients and citing to practices that are not clearly illegal, such as aggressive marketing tactics, delays in discharges and paying incentive compensation. Two of these cases have lead to significant financial settlements. Emboldened by these settlements and the current climate that is focused on rooting out "wasteful" Medicare spending, whistleblowers may seek to file more suits against hospices.

In light of these trends, we have prepared a series of two articles addressing the FCA and its significance to ordinary hospices. In this article, we address the basic questions a hospice might ask about the FCA. The FCA presents many complex questions that lawyers often debate, particularly in light of recent legislation that expanded the scope of the FCA.[1] This article is not intended to address those questions, but rather to provide hospices with a basic understanding of the FCA. A second article will address what hospices can do to help mitigate their risk of FCA lawsuits.

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Who Are Whistleblowers?

Most commonly, whistleblowers are former employees of the hospice, but any private party with knowledge of the alleged false claims may act as a whistleblower. In one recent case, a hospice filed an FCA lawsuit against a competing hospice.

Why Should Hospices Be Concerned About FCA Lawsuits?

In addition to a civil penalty of $5,500 to $11,000 per false claim, the government may recover up to three times the amount of damages it has sustained as a result of the FCA violations. The amount of potential liability can quickly add up into many millions of dollars, and hospices may be pressured to settle these cases to avoid the expense and uncertainty of litigation, as well as the possibility of exclusion from the Medicare and Medicaid programs. In addition, conduct that triggers a complaint under the FCA could also lead to criminal prosecution by the government.

Why Should Hospices Be Concerned About FCA Lawsuits Now?

While the FCA is not new, the growth of the hospice industry has lead to more hospices facing FCA lawsuits. This trend will likely continue, particularly in light of the government's aggressive efforts to eliminate "waste" in the Medicare and Medicaid programs.

In addition, the primary allegation in many of the FCA cases has been that the hospice admitted ineligible patients, raising concerns for ordinary hospices. Cases focusing on questions of hospice eligibility are unsettling, as prognostication is unavoidably inexact, and different clinicians (even within the government) may look at the same documentation and arrive at different conclusions about an individual's prognosis. CMS has long taken the position that its contractors can essentially second-guess a physician's certification of terminal illness by reviewing the documentation in the patient's medical record and denying the claim if the reviewer believes the documentation does not support a terminal prognosis. The hospice FCA cases raise the troubling prospect that not only Medicare contractors—but also hospice employees—might second-guess the clinical

judgment of the certifying physician and expose the hospice to significant liability.

How Does a False Claims Action Start?

A false claims action starts with a whistleblower filing a lawsuit. To file the lawsuit, a whistleblower will need to hire a lawyer to draft a complaint setting forth why the whistleblower believes the hospice has violated the FCA. The complaint will be filed "under seal" with the court and a copy will also be provided to the federal government. The hospice will not be served with a copy of the complaint at this time. The court will keep the complaint under seal while the government investigates the allegations and decides whether or not it will intervene in the case. Consequently, a hospice may not know that a whistleblower has filed a lawsuit for quite some time. If the government decides to intervene, it will essentially take over the case, but the whistleblower will still be entitled to a percentage of any settlement or damages that the government recovers. Even if the government decides to not intervene, the whistleblower can continue with the case.

What Are Whistleblowers Alleging in Cases Against Hospices?

Most of the complaints that whistleblowers have filed against hospices have alleged conduct that tracks the "risk areas" identified by the Office of the Inspector General ("OIG") in its compliance guidance for hospices. Below, we have briefly summarized the types of allegations that have appeared in these complaints. Note that the allegations in these complaints were never proven at trial, since these cases were either dismissed or settled.

- Admission of ineligible patients
- Admission of patients with long lengths of stay and ill-defined diagnoses
- Delays in discharging ineligible patients
- Backdating physician certifications or recertifications of terminal illness
- Providing kickbacks to nursing home employees
- Paying incentive compensation that resulted in the retention of ineligible patients
- Offering to provide free goods or services to Medicare beneficiaries to encourage them to enroll in hospice
- Alteration of clinical documentation to portray the patient as eligible for hospice
- Changing the patient's hospice diagnosis to support hospice eligibility

Are These Allegations Sufficient to Prove Violations of the FCA?

Typically, to show that a provider violated the FCA, the whistleblower must allege that the provider submitted false or fraudulent claims.[2] Reading these complaints, it is sometimes difficult to discern a line between claims that a Medicare contractor might deny for inadequate documentation and claims that could be described as false and lead to liability under the FCA. The predominant allegation in most of the FCA cases has been that the hospice admitted "ineligible" patients. To support the allegation that the hospice knowingly admitted ineligible patients, some of the whistleblowers allege conduct that could clearly lead to FCA liability (*e.g.*, forged physician certifications), but others cite to less egregious practices, such as aggressive marketing or paying incentive compensation, that could encourage admissions regardless of eligibility. Some of the whistleblowers have also supported their claims with internal audit reports or consultant reports, which concluded that there was inadequate documentation to support hospice eligibility.

Because most of the hospice FCA cases have either settled or been voluntarily dismissed, there have been very few court decisions to clarify whether the types of allegations being made by the whistleblowers are legally sufficient to show that a hospice submitted false claims in violation of the FCA. In an unpublished decision, one court has appeared to recognize the difference between situations where a physician's recertification of terminal illness was incorrect or even improper, which would not support an FCA violation, and recertifications that were fraudulent, which would lead to liability under the FCA. In practice, however, there remains considerable ambiguity in the line between situations that may lead to claim denials and situations that may lead to FCA litigation.

What Can Hospices Learn from These Cases?

Allegations that the hospice has admitted "ineligible" patients have formed the primary component of most whistleblower complaints against hospices. Hospices must understand that the consequences of documentation that fails to support a terminal prognosis could potentially extend beyond claim denials and targeted medical review. A disgruntled employee and poor documentation could open the door to FCA litigation.

The next edition of *Reinhart's Headlines in Hospice & Palliative Care* will address

more specific strategies for hospices to reduce the risks of FCA lawsuits.

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2 There is also a legal theory known as a "reverse false claim," according to which a violation occurs because the provider knowingly and improperly retained an overpayment.