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N.D. ILL.: UPCODING ALLEGATIONS AGAINST HOSPITALIST GROUP SURVIVE MOTION TO DISMISS

A recent case out of the Northern District of Illinois Federal Court, *US ex rel. Oughatiyan v. IPC the Hospitalist Company, Inc.*, demonstrates the high risk inherent in evaluation and management (E&M) coding for health care providers.

THE DECISION

The Defendants included nationwide group practice which contracts to place hospitalists in hospitals and its subsidiaries. The whistleblower, a former hospitalist with the Defendants, alleged the Defendants encouraged employed physicians to upcode hospital encounters. The encounters at issue were E&M coded patient encounters.

The whistleblower alleged that the Defendants ranked hospitalists based upon their coding levels, and that it pressured lower-billing physicians to use higher codes. The Defendant also created a "dashboard" that tracked the frequency of code usage. That dashboard could be used to monitor for excessive billing; however, the Government, which intervened in the complaint, argued it was used to monitor lower-billing, rather than higher-billing, physicians. It supported this claim by alleging that the Defendants' E&M billing was significantly higher than the national averages. The Government also alleged that the patients' records did not contain documentation to support the higher codes, and that the presumed amount of time spent per day with patients, applying the "typical" time found in the CPT manual, would exceed twenty-four hours in a day.

The Defendants moved to dismiss. The primary focus of the motion was the lack of specificity of claims against multiple defendants, subsidiaries of the IPC, which were lumped together with the parent company but without specific allegations as to each. However, the Defendants failed to challenge the core theory of the case, that specific documentation is required to bill for certain E&M codes and that those codes can be challenged based upon the "typical" times found in the CPT manual, even when time is not the controlling factor for billing:

the Intervener alleges that certain hospitalists billed for services that would have taken more than 24 hours to complete, but carefully omits any reference to which one of the 30 Defendants employed these hospitalists or to which third party payor these services were billed.{{1}}

Additionally, Defendants moved to dismiss alleging the Government lacked standing to bring the claims in the FCA complaint.

The Government prevailed against the Defendants' standing argument. The Defendants were successful in getting its subsidiaries dismissed. However, they failed to challenge the Government's E&M coding theories. the trial court therefore accepted the Government's unchallenged theory of fraud and denied the motion to dismiss the case entirely.

HEALTH CARE TAKEAWAY

The *Oughatiyan* case offers a couple of different lessons for health care providers. First, and perhaps most disturbing, even a program which, on its face, can properly be used to improve billing accuracy, such as the Defendants' "report card," can be flipped on its head to form the basis for accusations that it was used to perpetrate a fraud. These sorts of programs must be carefully implemented and monitored, lest the best intentions form the basis for the worst allegations.

Second, claims of fraud are often based upon coding "best practices" rather than actual binding Medicare or Medicaid rules or regulations. A provider wishing to avoid such actions should, in today's high-risk FCA environment, either maintain those "best practices" or clearly and appropriately document how they are not required, and properly and clearly support claims submitted in strict compliance with the actual rules. Finally, a defendant in such actions must engage counsel prepared to respond with an in-depth and nuanced understanding of the health care environment and the underlying billing requirements for providers. Failure to do so early on in litigation risks nipping baseless claims in the bud with a motion to dismiss.

Should you have any questions regarding this article or False Claims Act litigation and compliance, please contact:

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[[1]]Memorandum of Law in Support of Defendants' Joint Motion to Dismiss or, in the Alternative, to Sever, p. 8.[[1]]