

FALSE CLAIMS EXPOSURE IN CREDENTIALING AND PEER REVIEW

The Federal Government has reinforced its expanded theory of false claim liability for quality matters by settling allegations against a hospital that a physician's lack of qualifications to perform certain surgical procedures should be considered a false claim, regardless of the patient's outcome. As part of the settlement, the hospital defendant paid the Government \$840,000 to resolve false claims allegations against it; the lawsuit remains active against the physician defendant. The Government's position is that hospitals bear false claim exposure for failing to perform adequate credentialing and peer review.

BACKGROUND

In *United States ex rel. Rogers v. Azmat*, the Government intervened in a *qui tam* action brought by a cath lab nurse who alleged that certain endovascular services provided by a physician on the Hospital's Medical Staff to Medicare and Medicaid beneficiaries constituted false claims because they were "worthless and not medically necessary." The cath lab nurse was formerly employed by Satilla Regional Medical Center ("Hospital"), the hospital defendant in the case. The allegations focus on Dr. Najam Azmat's ("Physician") competence to perform endovascular procedures in the Hospital's cath lab and that the Hospital failed to address serious quality issues with the Physician's patient care.

The Physician was granted Medical Staff privileges at the Hospital in August 2005. Almost immediately, nurses in the Hospital's cath lab recognized that the Physician lacked the necessary training, experience and clinical ability to safely perform endovascular procedures. The complaint reveals that nurses observed that the Physician did not have basic knowledge about which catheters to use and demonstrated poor technique. Several cath lab nurses immediately reported their concerns to Hospital administration. The nurses inquired as to whether the Physician had privileges to perform endovascular procedures. Neither administration nor the Medical Staff pursued the complaints. By the end of 2005, the Physician had shown no improvement, ultimately resulting in the dissection of a patient's aorta in December 2005. In response, the cath lab nurses stated they would no longer work with the Physician and/or expressed concern about doing so. When a cath lab nurse again questioned the Physician's competence in January 2006, she was summarily fired and, shortly thereafter, filed a *qui tam* action.

In the complaint, the Government alleged that the Hospital knew, recklessly ignored or deliberately ignored that:

- The Physician's complication rate in endovascular procedures was exceedingly high;
- The Physician's privileges at a prior hospital were restricted because of intraoperative and postoperative complications;
- The Physician had three medical malpractice suits pending against him in another state;
- There were repeated complaints about the Physician's competence to safely perform endovascular procedures from the beginning of his practice in the Hospital; and
- The privileges initially granted to the Physician did not include privileges to perform endovascular procedures, but he was allowed to perform them for over 15 months.

GOVERNMENT'S THEORY

Because the Physician was not qualified, competent or credentialed to perform endovascular procedures, the Government alleged that claims for endovascular procedures were false and fraudulent. And for this reason, the Physician's endovascular procedures "were not reasonable and necessary, were incompatible with standards of acceptable medical practice, were worthless and of no medical value...". The Government argued the Hospital knew or should have known that the Physician was not competent to provide endovascular services and that the Hospital failed to address the Physician's lack of competence through the credentialing process or by taking corrective action via the Medical Staff Bylaws. Consequently, the Hospital knowingly allowed the Physician to provide worthless services and then billed the Medicare and Medicaid programs for them. As a result, each such claim was a false claim.

TAKE AWAYS

While there are a number of unresolved legal questions due to this settlement, the *Azmat* case demonstrates that a hospital's credentialing and ongoing quality review functions have a significant corporate compliance element. It is further indication of the Federal Government's focus on quality and its use of all available tools to combat fraud and abuse. These tools range from *qui tam* actions to data mining of claims. A failure to diligently execute peer review responsibilities can lead to False Claims Act exposure and repayments, in addition to the substantial risks presented to patient safety. Hospital and Medical Staff Leadership should ensure that:

- All quality improvement, FPPE and OPPE processes are functioning properly;
- All credible quality and conduct related "red flags" raised during the credentialing process and allegations of poor patient care are timely and effectively investigated and addressed; and
- They consider potential compliance exposure when addressing patient care matters that raise questions about the standard of care or medical necessity.

The Department of Justice's press release announcing its settlement with Satilla Regional Medical Center can be found at:

<http://www.justice.gov/usao/gas/pr/2012/04Satilla.pdf>.

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