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OSN COMPLIANCE and the Law


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OCULAR SURGERY NEWS brings you issues in compliance with billing and coding regulations.

Failure to refund overpayments might constitute violation of the False Claims Act

The government employed this legal theory in a prosecution against a physician practice that recently settled for $2.9 million.

by Anthony H. Choe

Special to OCULAR SURGERY NEWS

Physician practices should routinely monitor overpayments and promptly pay refunds to reduce their risk of violating the federal and applicable state false claims acts. Although the Justice Department has actively prosecuted hospitals in recent years for their failure to disclose and refund known overpayments, a recent settlement suggests that the government's scrutiny is shifting toward physician practices.

In January, East Tennessee Heart Consultants (ETHC), a 42-member cardiology practice, agreed to pay $2.9 million and enter into a 5-year Corporate Integrity Agreement to settle allegations that it had violated the federal False Claims Act and the Tennessee Medicaid False Claims Act. Although the original complaint, filed by two ETHC employees-turned-whistleblowers, contained 12 counts, ETHC's settlement agreements with the United States and the state of Tennessee focused on the practice's concealment of overpayments in its billing systems and its failure to refund overpayments to government health care programs.

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Overpayments

A common phenomenon, overpayments are funds that a physician practice has received that exceed the amounts due and payable under the payer's policies. These overpayments may be the fault of either the physician practice or the payer. For example, the practice could have submitted a duplicate claim to more than one insurer. Alternatively, a payer may subsequently deny claims it had originally paid, send payments to the wrong practice or inappropriately reimburse noncovered services.

Because overpayments occur regularly, they have been the subject of guidance published by the Office of Inspector General (OIG) in the Department of Health and Human Services and by the Centers for Medicare and Medicaid Services (CMS). For example, the "OIG Compliance Program for Individual and Small

Group Physician Practices" recommends that physician practices adopt policies to "take appropriate corrective action, including [the] prompt identification and repayment of any overpayment to the affected payor." Similarly, in "What Physicians and Other Suppliers Should Know About Medicare Overpayments," CMS reminds physicians that they "are responsible for making voluntary/unsolicited refunds to Medicare as soon as possible, without waiting for notification."

Despite this guidance, from 1995 to 2005, ETHC had implemented a policy to: (1) retain overpayments received from Medicare, Medicaid, TRICARE, FEHB and TennCare (the state Medicaid program) and (2) issue refunds only when specifically requested by these programs. Consequently, the government alleged that the claims submitted by ETHC during this period were false because "ETHC had an existing legal obligation to pay or transmit money to the government previously received by ETHC as overpayments on prior claims and because during this same time period ETHC submitted certain duplicate claims to both primary and secondary payers which resulted in overpayments."

Settlements

As part of its settlement agreements, ETHC paid approximately $1.5 million to the United States, $200,000 to the state of Tennessee, approximately $1 million to its patients and $200,000 to private health plans. Also, as part of its Corporate Integrity Agreement, ETHC agreed that "[i]f, at any time, ETHC identifies or learns of any overpayment, ETHC shall notify the payor … within 30 days after identification of the overpayment and take remedial steps within 60 days after identification … to correct the problem, including preventing the underlying problem and the overpayment from recurring."

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Notably, the ETHC settlement represents an evolution in the government's prosecution of providers and suppliers who fail to refund overpayments. In prior years, prosecutions under this theory have targeted hospitals and medical centers: Jackson Memorial Hospital (2006), $14 million settlement; St. Elizabeth Regional Medical Center (2006), $4 million; Eisenhower Medical Center (2005), $8 million; HealthSouth Corp. (2004), $736,410; Lovelace Health Systems (2002), $24.5 million; and St. Joseph's Hospital (2002), $1.5 million. Now, with the ETHC settlement, whistleblowers and the government have shown their willingness to use this legal theory to pursue fraud and abuse enforcement actions against physician practices.

Because the whistleblower provisions of federal and state false claims acts create a strong financial incentive for employees and other parties to disclose fraud and abuse violations to the government, physician practices should ensure that their policies and procedures are compliant with all applicable laws, not only those related to overpayments. OSN

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