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Ophthalmologist also liable for hospital's false claims

--By Alan E. Reider, Arnold & Porter LLP

From international law firm Arnold & Porter LLP comes timely views on current regulatory and legislative topics that weigh on the minds of today's physicians and health care executives.

In what is believed to be the first settlement of its kind, an ophthalmologist recently agreed to resolve a False Claims Act complaint that alleged he performed medically unnecessary laser services to Medicare patients and caused the hospital where the procedures were performed to file false claims, and, therefore, he also should be liable for those claims.

The alleged unnecessary laser procedures included argon laser trabeculoplasties, lysis of adhesions, and laser peripheral iridotomies. While claims against ophthalmologists for unnecessary laser procedures are not new, this case, filed against Baltimore ophthalmologist John Kiely, MD, may be the first in which the government alleged that a physician was responsible for the false claims he filed, as well as for the false claims filed by the hospital where the services occurred.

Under the False Claims Act, a defendant is liable for filing false claims, as well as for "causing false claims to be filed." In the government's view, because the laser services performed by Kiely were not medically necessary, not only were his claims false, but the claims filed by the hospital also were false. If the government were to prevail at trial, Kiely would have been responsible for the hospital's claims as well as his own claims, dramatically increasing his potential liability under the law. Rather than risk an unfavorable verdict, Kiely settled the case.

As a result of the settlement, Kiely agreed to pay \$1.4 million and to accept a voluntary 20-year exclusion from federal programs. This case, therefore, represents another example of the government taking more aggressive positions in enforcement cases, further raising the risk to physicians accused of providing services that, in the view of the government, are not appropriate.

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