

Insight and Perspectives

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Welcome

We are pleased to offer our latest installment of *Insight and Perspectives*. This newsletter is dedicated to sharing healthcare news, trends and developments impacting our brokers and insured customers.

In this particular installment you will find Dan Bailey's article discussing key implications of the Fraud Enforcement and Recovery Act of 2009.

We appreciate the support you've given Endurance U.S. Healthcare, and we're pleased to announce we're expanding our offerings to include healthcare D&O as well as other financial products. Contact our New York underwriting team for additional details.

Yours Truly,



Kim Willis

About Us

Endurance U.S. Healthcare offers lead and capacity healthcare professional liability coverage to community-based hospitals and large-physician groups.

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False Claims Act Amendments: Increased Exposures for Health Care Providers

By Dan A. Bailey

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One of the biggest liability exposures for healthcare providers in recent years has been claims by or on behalf of the federal government relating to alleged Medicare fraud and abuse practices. Those claims are brought under the False Claims Act ("FCA"), which allows not only the U.S. government to assert claims against entities or individuals who defraud the government, but also allows individual whistleblowers to bring claims on behalf of and for the benefit of the U.S. government. If liable, defendants must pay compensatory and treble damages as well as a penalty and expenses.



On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA), which amends the FCA in several important respects to enhance the ability of the government and whistleblowers to identify and successfully pursue entities and individuals who improperly receive government funds. Since Medicare payments are a significant portion of many healthcare providers' revenue, these statutory changes increase compliance risks, and may result in significant new exposures for healthcare providers. The following summarizes several of the more important aspects of the new legislation, which is now in effect.

RETAINING OVERPAYMENTS

Prior to FERA, whistleblowers could assert a claim under the FCA only if the provider wrongfully obtained government funds to which the provider was not entitled. If the provider received excessive funds as a result of an error by the government or an innocent mistake by the provider, the harsh penalties under the FCA did not apply. Pursuant to the new legislation, whistleblowers can now bring an FCA action against providers who knowingly and improperly keep government funds paid to them in error.

Although the new statute probably does not apply to overpayment situations in which the provider retains excess payments pending an audit or payment reconciliation, providers nonetheless face significant increased exposure under the statute because it is often difficult to confirm all payments made by government programs are correct. An open question under the statute is whether a whistleblower can assert an overpayment action based

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on the premise that the provider should have known the payment was in error or should have exercised greater oversight to confirm the accuracy of incoming payments. In any event, providers should now reevaluate their internal controls and compliance procedures to assure reasonable efforts are being devoted to identifying and promptly refunding over-payments.

DEFRAUDING GOVERNMENT CONTRACTORS

Prior to FERA, providers often raised as a defense in a false claim proceeding that the provider submitted Medicare payment requests to and received payments from a private contractor rather than the government directly. Because state Medicaid funds are often commingled with federal Medicare funds and because of the maze of subcontractors involved in administering Medicare, it was often difficult for the whistleblower to prove the provider intended to defraud the federal government.

FERA eliminates that defense by including within the scope of the FCA any payments received not only directly from the federal government, but also from contractors, grantees or others so long as the payments are on the federal government's behalf or to advance a federal government program or interest.

ATTORNEY GENERAL INVESTIGATIONS

Prior to FERA, the U.S. Attorney General had exclusive authority to investigate potential false claims against the government and was the only official empowered to require providers to produce documents, provide oral testimony and answer written interrogatories. As a result, the Attorney General's office often gave FCA investigations lower priority than more visible and pressing matters.

Under FERA, the Attorney General may delegate this investigative authority to others, such as assistant U.S. attorneys. This will likely result in more FCA cases being prosecuted with greater speed and resources.

WHISTLEBLOWER ACCESS TO INFORMATION

Prior to FERA, whistleblowers often had difficulty successfully prosecuting an FCA action because they did not have direct access to specific provider invoices or other critical evidence. Under FERA, the Attorney General or its designee may now share investigative findings and other relevant information with the whistleblower even if the government does not intervene in the proceeding. This should enhance the strength of whistleblower claims and may reduce the number of cases in which the government

intervenes, particularly if whistleblowers can more frequently and more effectively prosecute the action without government assistance.

In summary, the new amendments to the False Claims Act will likely result in more frequent, broader and more aggressively prosecuted FCA actions against healthcare providers and their management arising out of Medicare reimbursement practices and payments. Although this is not a new area of concern for healthcare providers, the frequency and severity of the exposure will probably increase as a result of the new statute. As a result, providers are well-advised to review their compliance activities to assure they have comprehensive and state-of-the-art programs in place which are in fact being followed. The financial consequences for inadequate procedures and lax compliance efforts are now greater than ever. ◀

The views expressed in this article are those of the author and are not necessarily the views of Endurance. The information in this article is not intended to provide legal advice as to any of the subjects mentioned but is presented for general information only. Readers should consult knowledgeable legal counsel as to any legal questions they may have.

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