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Report on Medicare Compliance Volume 30, Number 23. June 21, 2021
DOJ Intervenes in FCA Suit Filed by 'Data Whistleblower,' Adding Insider Allegations

By Nina Youngstrom

For the first time, the Department of Justice (DOJ) has intervened in a novel whistleblower lawsuit against a health care organization that alleged the submission of false claims based on a statistical analysis of Medicare data. DOJ took the ball and ran with it, adding firsthand knowledge of the alleged fraud from insiders to the data from the outsider whistleblower.

The U.S. Attorney's Office for the Southern District of New York announced June 2 it intervened in the False Claims Act (FCA) lawsuit against a skilled nursing facility company that was set in motion by Integra Med Analytics LLC, an associated company of Integra Research Group LLC.[1] The FCA lawsuit alleges that false claims were submitted to Medicare by Isaac Laufer,[2] owner of Paragon Management SNF LLC; 10 of its skilled nursing facilities (SNFs) in the suburbs around New York City; and Paragon employee Tami Whitney, coordinator of rehabilitation services for the SNFs. They allegedly kept patients in the SNFs longer than necessary and billed for the most expensive therapy regardless of their clinical needs or ability to benefit. The SNFs include Oasis Rehabilitation and Nursing LLC, Treetops Rehabilitation & Care Center LLC and Long Island Care Center Inc.

Although auditors and enforcers often use data analysis to identify outliers, this case is unusual because a whistleblower set it in motion purely with a statistical analysis. Integra Med Analytics used "unique algorithms and statistical processes" to identify alleged false claims "with specificity," according to its 2017 complaint. "The role that data whistleblowers can play is one of a force multiplier as they can detect frauds the government may not have had the opportunity to do yet," said attorney Mary Inman, with Constantine Cannon. "Hospitals should be prepared to see more of these cases," although so far they have been dismissed by courts in the hospital realm for alleged MS-DRG upcoding. Also, with claims data publicly available, data whistleblowers could pursue other avenues of potential fraud, including inpatient admissions vs. observation and evaluation and management upcoding, said attorney Max Voldman, with Constantine Cannon. When DOJ is on board, "it's data plus an investigation." That model may prove fruitful given the government's limited resources, he noted.

DOJ Intervenes in 'Data Whistleblower' Suit

Because data whistleblowers presumably have a different mindset from insiders, they won't use hotlines and other aspects of an effective compliance program to try to remedy compliance issues at health care organizations. "The data whistleblower phenomenon is one where your hotline is not going to capture it because you have someone outside reviewing data," Inman said. Then again, health care organizations with effective compliance programs and "robust reporting mechanisms" are less likely to commit fraud, Voldman noted.

SNF Discharges Allegedly Driven 'Purely by Profit'

According to DOJ's 2021 complaint in intervention, the SNFs allegedly engaged in two practices "that caused the submission of false claims to Medicare for unreasonable, unnecessary, or unskilled therapy" from January 2010 to September 2019. They tried to keep Medicare patients as long as possible—close to the 100 days covered by

Medicare Part A—whether or not they needed to be there, and "sought to maximize Medicare billings for rehabilitation therapy," the complaint alleged. "They did so by directing Facility staff to assign all or most Medicare Part A patients to the Ultra High therapy level, regardless of the patients' actual needs."

During the years false claims were allegedly submitted, Medicare paid SNFs under the prospective payment system based on Resource Utilization Groups (RUGs), before CMS switched to the Patient Driven Payment Model in 2019. Reimbursement for RUGs was driven by skilled nursing services and occupational, speech and physical therapy, with an emphasis on therapy. There were five rehabilitation levels for patients who required therapy: ultra high, very high, high, medium and low. Patients were assigned to a level based on the number of therapy minutes they received during a seven-day assessment period. Ultra high, for example, represented at least 720 minutes per week of therapy combined from at least two therapy disciplines, and one discipline had to be provided at least five days a week; it generated between $527.80 and $832.61 in reimbursement. Low therapy was a minimum of 45 minutes per week over at least three days a week with any mix of disciplines; it generated $259.69 to $540.92 of reimbursement.

According to the complaint, Laufer monitored the SNFs' performance, and when he thought their discharge numbers were too high, he allegedly instructed Whitney to extend patient stays. "These instructions never referenced patients' clinical needs or what was medically appropriate; indeed, Laufer did not have any information about those issues. Instead, Laufer made explicit that his directives regarding discharges were purely driven by profit," the complaint alleged.

In turn, Whitney often challenged discharge decisions if patients were scheduled for discharge before 85 or 90 days, and sometimes overruled the discharge decisions, according to employees. Sometimes Whitney and the SNF came up with strategies to keep patients longer, the complaint alleged. For example, a patient's therapy goal of walking 20 feet might be changed to 25 feet, one therapist allegedly said.

"At times, the drive to keep Medicare patients at the Facilities for as close as possible to 100 days resulted in the Facilities intentionally stunting patients' progress so that they would not reach the point where they could be discharged," the complaint alleged. An employee at one SNF said its rehabilitation director allegedly wouldn't allow walkers in patient rooms to inhibit patients' ability to ambulate.

SNFs Allegedly Billed Far More Therapy Than Peers

The defendants also allegedly intended to bill Medicare for as much skilled therapy as possible and to put almost every patient at the ultra high therapy level, which is the most lucrative, regardless of their clinical situation, according to the complaint. As a result, therapy was provided to patients who weren't expected to benefit from it, including incapacitated patients. For example, a therapist at Oasis Rehabilitation and Nursing "reported simply moving the arms and legs of patients who were not cognitively present—activities that do not constitute skilled therapy and were performed simply to reach the requisite number of therapy minutes for the Ultra High level," the complaint alleged. Whitney allegedly directed the SNFs to put new patients on ultra high therapy "by default," which had "the desired effect: the Facilities billed for more Ultra High therapy than the vast majority of skilled facilities nationwide, including in terms of both the average number of therapy days per patient billed to Medicare at the Ultra High level and the proportion of overall therapy that was billed at the Ultra High level."

The complaint gave examples of patients for whom false claims were allegedly submitted to Medicare. Patient A was at LICC from Dec. 11, 2017, through March 20, 2018, and the SNF billed Medicare for 100 days at the ultra high therapy level "despite the fact that Patient A had difficulty participating in therapy due to significant cognitive deficits and had been hospitalized for multiple rib fractures."

It's noteworthy the case is gaining momentum when it was based initially on data alone, Inman and Voldman

said. Integra Med employed this strategy in three other FCA lawsuits that have been made public so far, which were filed against hospitals. For example, Integra Med used a statistical analysis of Medicare data to allege that Providence Health & Services in California added "unsubstantiated" major complications and comorbidities to increase its MS-DRG reimbursement, according to the whistleblower complaint.[3] DOJ declined to intervene, and a federal court dismissed the lawsuit. The two other Integra Med cases filed against hospitals also were dismissed by courts when the whistleblower proceeded on its own after DOJ did not intervene.

'I'm Not Sure it Can Be Replicated in Every Case'

But DOJ has joined the SNF case, possibly because of the unique set of circumstances, Inman said. The fact that there was one owner and Integra Med was allegedly able to track the data across all the SNFs and compare billing before and after Laufer bought the SNFs "is a bit of a perfect storm," she said. "I'm not sure it can be replicated in every case."

According to Integra Med's complaint, "there's no legitimate explanation" for the SNFs' billing. The whistleblower alleged that its analysis found that ultra high therapy for patients at Laufer's SNFs suddenly dropped at 60, 90 or 100 days—exactly when they have to justify it to CMS. They administer it at 5.8 times the rate of other facilities, the complaint alleged. The whistleblower's "fixed-effect regression model rules out the possibility that specific patient characteristics and symptoms justify the need" for all that ultra high rehab.

Also revealing was the comparison of therapy before and after Lauer bought the SNFs, according to the Integra Med complaint. The whistleblower allegedly found a "statistically and economically significant" increase in the amount of ultra high rehab provided to patients at two facilities after Laufer bought them in 2013. "This increase is highly significant even after controlling for potential changes in patient and demographic characteristics after the acquisition, which indicates that it is Laufer that is responsible for the excessive ultra high rehab that was billed to Medicare," the complaint alleged.

Laufer couldn't be reached for comment.

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1 Department of Justice, U.S. Attorney's Office for the Southern District of New York, "Manhattan U.S. Attorney Files Suit Against Eleven Skilled Nursing Facilities And Their Management Company, Owner, And A Senior Employee For Fraudulently Billing Medicare For Unnecessary Services," news release, June 2, 2021, https://bit.ly/3iNNJPs.
2 United States of America ex rel. Integra Med Analytics LLC v. Issac Laufer et al., 17 Civ. 9424 (CS) (S.D.N.Y. 2021). https://bit.ly/3wDbAp1.
3 United States of America ex rel. Integra Med Analytics LLC v. Providence Health Services et al., Case No. 2:17-cv-01694-PSG-SS (C.D. Cal. 2018), https://bit.ly/3q1HOHM.