Enforcement, Compliance and Long Term Care: Nursing Homes

HCCA Conference
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Enforcement, Compliance and Long Term Care: Nursing Homes

• Failure of Care/Abuse and Neglect cases
• Rehab therapy and other types of cases
• Elder Justice Task Forces and other enforcement trends
Why do we care about these cases?

• Cases often involve harm, suffering and sometimes death of frail elderly residents
• Our chance to protect residents from abuse and neglect and hold owners liable for harm and fraud
• Abuse and neglect costs the Medicare and Medicaid system billions of dollars
• The Government is not getting what it’s paying for and owners are profiting

Types of cases

• Failure of Care/Worthless Services
• Rehab therapy cases
• Other cases including, kickbacks, long term care pharmacies, failure to report etc.
How do these cases/tips come to the Government?

- *Qui tam* or whistleblower lawsuits
- Reporting of the conduct through
  - OIG hotline
  - Ombudsmen
  - Additional reporting mechanisms

Legal Theories

- Executive Law 63 (12)
- Criminal- Federal Health Care Fraud, Wire Fraud, etc.
- Breach of Contract, Common Law Fraud, Unjust Enrichment
- Administrative
Failure of Care/
Worthless Service Cases

False Claims Act and Failure of Care cases

• FCA cases pursued against health care providers who:
  • knowingly render grossly substandard care or no care at all, and
  • bill Medicare or Medicaid for the alleged care
• “Worthless Services” Theory
Worthless Services Cases under FCA

Some cases have held that in order to sustain a worthless services theory, the service performed must be so deficient as to be equivalent to no performance at all.

- United States ex rel. Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001)
- Chesbrough v. VPA P.C., 655 F.3d 461 (6th Cir. 2011)
- United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699 (7th Cir. 2014)

Other cases, however, have held that it is not necessary to show that services are completely lacking:

- Complaint alleged that Defendants defrauded the government by submitting claims for nursing home care that was either nonexistent or “so inadequate as to be worthless.”
- “Sufficient to show patients were not provided the quality of care which meets the statutory standard.”

- Complaint alleged Defendants provided inadequate care, inadequate staffing, and inadequate supervision, which resulted in harm to residents.
- “Worthless services claims under the FCA are not, as a legal matter, limited to instances where no services at all are provided.”

- Complaint alleged that Defendant optometrist and his employer provided eye examinations to so many nursing home residents in a single day that the examinations provided must have been so cursory that they were worthless.
- “Worthless services allegations, which indicated that in some cases the doctor must have spent less than four minutes with each patient, were sufficient to survive a motion to dismiss.”
Recent DOJ Investigations


• The United States recently filed a False Claims Act lawsuit against Vanguard Healthcare LLC, and six of its nursing homes and related entities, as well as Vanguard’s Director of Operations

• The lawsuit alleges that the defendants were responsible for the submission of false claims to Medicare and TennCare for skilled nursing home services that were either non-existent or grossly substandard. The lawsuit also alleges that the defendants submitted required nursing facility Pre-Admission forms with forged physician and nurse signatures

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*United States vs. Vanguard cont’*

Specifically the United States alleged that the lack of adequate care at the Vanguard facilities included:

• chronic staffing shortages and shortages of critical medical supplies
• failure to provide standard infection control
• failure to administer medication to residents as prescribed by their physicians
• failure to provide wound care as ordered by physicians, failure to adequately manage residents’ pain, and
• providing unnecessary and excessive psychotropic medications to residents and using unnecessary physical restraints on residents.

As a result, it alleges that Vanguard residents suffered pressure ulcers, falls, dehydration, and malnutrition, among other harms.
Recent DOJ Investigations/settlements

Extendicare Settlement--October 2014
• Extendicare Health Services, Inc. and its subsidiary Progressive Step Corporation settled for $38MM
  ◦ Alleged to have billed Medicare and Medicaid for materially substandard nursing services that were so deficient that they were effectively worthless and billed Medicare for medically unreasonable and unnecessary rehabilitation therapy services.
• Allegations included
  ◦ Employing fewer skilled nurses than needed to care for the very sick residents in its facilities and
  ◦ Failure to train and supervise the staff

State AG- Investigative Tools/Legal Theories
• 18 NYCRR 504.3 Letters
• 18 NYCRR § 518.7- Withhold power – credible allegations of fraud
• Executive Law 63(12)
• Subpoena Power
• Fraud and Illegality in Conducting Business
  ◦ Penal Law violations; especially falsification of business records; no one wakes up and starts falsifying records!
  ◦ Public Health Law violations/misdemeanor/fines
  ◦ Survey History: every deficiency is a violation of law; they add up.
• Money Damages and Injunctive Relief
• False Claims Act – State Finance Law (Marie/Chris)
  ◦ Subpoena Power
  ◦ Knowingly making or causing to be made false Claims to Medicaid
  ◦ Treble Damages/$6-10k per claim
• Government Funds Obtained Without Right – Executive Law 63-c
• Unjust Enrichment
Recent NY AG investigations/settlements

Medford
• 17 Arrests and Convictions between 2008-2010 of CNAs and LPNs
• Turnover of Administrators/Senior Nursing Staff
• Ownership remained consistent throughout: “it comes from the top”
• Facility plagued by
  • Poor DOH Survey History (15 deficiencies per year)
  • History of high # of Complaints
• Allegations of short-staffing/lack of accountability and supervision/filling in the blanks
• Post arrests; number of reported incidents decreased while number of incidents and accidents remain high (averaging 20 per week)
  • Reflect cover up? E.g., Failure to Report? Falsifying Business Records?

Medford Cont’--Dollars Out

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<tr>
<td>Dollars taken out by Owners</td>
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<td>Total Staff Dollars (400 employees)</td>
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<td>% To Owners</td>
<td>31%</td>
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<td>41%</td>
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### ANALYZE NURSING STAFFING CUTS AND EVENTS OCCURRING AT MEDFORD

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<td>Annual Percentage</td>
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<td>Events at Nursing</td>
<td>16 DEFs</td>
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<td>19 DEFs</td>
<td>37 DEFs</td>
<td>7 DEFs</td>
<td>9 DEFs</td>
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<td>Home</td>
<td>6 Arrests</td>
<td>8 Arrests</td>
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<td>11 Arrests</td>
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<td>Including Mrs. Rios</td>
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<td>Death on Vent Unit</td>
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### Medford Results

- **Coordination:** filing of Civil Complaint and Arrests in February 2014
- **Convictions/Civil Recovery:**
  - 9 Nurses/Aides Convicted
  - The Administrator Pled Guilty
  - The Corporation Pled Guilty
  - Compliance Program/monitor
  - Restitution to Medicaid Program
  - Establishment of Resident Care Fund
Recent NY AG investigations/settlements

Mohawk Prosecution and Settlement
• Run of the mill patient abuse complaints that turned into indictment of the Administrator, the DNS, two owners, the sons of the majority owner, and the Corporation
• The key to that case was the investigative team
• Guilty Pleas by DNS, Administrator, two sons/owners and Corporation
• Civil Settlement
  • Compliance Program
  • Monitor in Place
  • $1 Million Restitution to Medicaid Program
  • Bad owners out of home

Rehab Therapy Cases
Rehab Therapy Cases

FCA cases pursued against skilled nursing facilities that:

• knowingly cause the submission of false claims to Medicare for medically unnecessary rehabilitation therapy services

Rehab Therapy Cases

• Types of potentially relevant evidence
  • RU/ALOS related targets untethered to patient needs
  • Bonuses or other rewards based on achieving RU/ALOS targets
  • Punishment or termination for failing to achieve RU/ALOS targets
  • Internal complaints regarding corporate pressure to achieve RU/ALOS targets
  • Pressure to keep patients longer than medically necessary
  • Ramping/suspension bridging
Recent DOJ investigations/settlements

RehabCare/Kindred Healthcare Settlement--January 2016
• Kindred Healthcare/RehabCare (nation’s largest nursing home therapy provider) settled for $125 million
• Allegations included that skilled nursing facility submitted false claims to Medicare for rehabilitation therapy services that were not reasonable, necessary, and/or were unskilled primarily by:
  • Presumptively placing patients in the highest therapy reimbursement level
  • Not basing treatment on the needs of the individual patients
  • Inflating reporting time on initial evaluations
  • Not reporting actual minutes of therapy time with patients

Recent DOJ investigations/settlements

U.S. ex rel. Martin v. Life Care Centers of America, Case No. 1:08-cv-251/1:12-cv-64 (E.D. Tenn.)
Government alleged Life Care billed Medicare for medically unnecessary and/or unskilled therapy services and pressured therapists to target Ultra High RUG level without regard to the individualized needs of the patients.

Other RUGS cases filed include:
• HCR Manorcare
• SavaSeniorCare
Kickback Cases

• **Omnicare** settlement (2014): resolving allegation that nation’s largest provider of pharmaceuticals and pharmacy services to nursing homes offered improper financial incentives to skilled nursing facilities in return for their continued selection of Omnicare.

• **RehabCare** settlement (2014): resolving allegations that contract therapy providers RehabCare Group Inc., RehabCare Group East Inc. and Rehab Systems of Missouri and management company Health Systems Inc. violated the False Claims Act by engaging in a kickback scheme related to the referral of nursing home business.

Remedies

• Money damages
• Monitoring and other injunctive relief
• Payment suspensions/Withholds
• HHS-OIG remedies (exclusion, CIA)
Defenses

- Substandard care is not actionable under the False Claims Act
- Residents are getting some valuable services
- False Claims Act v. Medical Malpractice and other remedies
- Physician discretion
- Battle of the experts

Elder Justice Task Forces and Other Enforcement Trends
Elder Justice Task Forces


Elder Justice Task Forces
State of New York

http://nyselderabuse.org/
New Trends in DOJ Investigation and Enforcement


New Trends in AG NY Investigations and Enforcement – Nursing Home Task Force

- Investigation in Rochester: Poor Quality of Care Evidence by Surveys/Staffing Cuts/Problem Staff/Little Evidence of Diversion of Funds to Owners but Pilfered Patient Fund Accounts
- Investigation in Albany: Tagged/Allegation of not reporting/1,700 I/As in 2014-averaging 32 per week/failure to report/Excessive withdrawals of equity to related parties
- Investigation in HAU/NYC: Evidence of self dealing through related parties/vendor kickbacks and tax evasion/Lack of arrests and DOH findings
- Investigation in NYC: Evidence of dollar to dollar diversion of funds from Direct Care costs to owners through management company despite servicing high need population/lack of arrests & DOH findings
- Investigation in Buffalo: Multiple Arrests/Recent Ventilator Death/Senior Staff Turnover/Not-for Profit Board Oversight Lacking/Absent/High Administrative Fee financial strain on facility