False Claims Act Liability in Post-Acute Care

HCCA Enforcement Virtual Conference

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False Claims Act Liability in Post-Acute Care

Topics

- Review of Recent FCA Cases in PAC
- Enforcement Trends
- Compliance Challenges and New Areas of Risk
- Questions and Answers

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Review of Recent FCA Cases in PAC

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Recent FCA Cases in PAC – SNF Therapy

- 02/19/2020 – Guardian Elder Care - $15.4 M Settlement
  - Guardian operates 50 SNFs nationwide
  - Rehab furnished at the highest level was not medically necessary
  - Amount of rehab influenced by financial considerations, not resident need
  - Alleged conduct occurred from 01/2011 – 12/2017
  - Allegations originated from 2 whistleblowers (former employees)
  - Guardian also voluntarily disclosed employment of 2 excluded persons
  - Guardian agreed to a chain-wide Corporate Integrity Agreement

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Recent FCA Cases in PAC – SNF Therapy

- 02/28/2020 – Diversicare – $9.5 M Settlement
  - Diversicare operates 74 SNFs nationwide
  - Corporate practices placed patients in Ultra High rehab regardless of need
  - "Profit-driven practices" resulted in unreasonable and unnecessary rehab
  - Rehab frequency, duration and intensity were not reasonable and necessary
  - Alleged conduct occurred from 01/2010 – 12/2015
  - Allegations originated from whistleblowers (former employees)
  - Settlement resolves allegations of forged Medicaid PAEs of patient need
  - Diversicare agreed to a 5-year Corporate Integrity Agreement

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Recent FCA Cases in PAC – SNF Therapy

- 04/10/2020 – Encore Rehab – $4.0 M Settlement
  - Encore knowingly caused 3 SNFs to submit false claims to Medicare
  - Rehab was not reasonable, necessary or skilled
  - Group and concurrent minutes were reported as individual
  - Alleged conduct occurred from 10/2010 – 07/2018
  - Allegations originated from 4 whistleblowers (former employees of Encore)
  - Settlement included agreement for 5-year CIA

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Recent FCA Cases in PAC – SNF Therapy

- 04/14/2020 – Saber Healthcare - $10 M Settlement
  - Therapy billed to Medicare was not reasonable, necessary or skilled
  - Alleged that therapists were expected and pressured to deliver Ultra High therapy to each patient, overriding therapist's clinical judgment
  - Also, therapists reported evaluation time and unskilled care as treatment time
  - Conduct alleged to have occurred at 7 SNFs from 01/2013 to 03/2017
  - Lawsuit arose from whistleblowers (former employees)
  - Saber also entered into a 5-year CIA

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Recent FCA Cases in PAC – SNF Therapy

- 07/13/2020 – Longwood Management – $16.7 M Settlement
  - Settlement covers conduct at 6 of Group's 27 SNFs
  - Settlement resolves allegations that:
    - Management pressured therapists to provide more therapy to meet pre-planned targets
    - Targets were set without regard to patients' individual therapy needs and could only be met by billing Ultra High therapy
    - Company engaged in "systematic effort to increase Medicare billings"
  - Alleged conduct occurred from 05/2008 – 08/2012
  - Lawsuit originated from 3 whistleblowers
  - Longwood entered into 5-year Corporate Integrity Agreement

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Recent FCA Cases in PAC – Hospice

- 08/19/2020 – MJHS Hospice – $5.2 M Settlement
  - Settlement resolves allegations that:
    - Hospice billed higher levels of care than medically necessary
    - Medicare and Medicaid claims for unnecessary GIP and CHC
  - Medicare settlement was $4.85 M
  - Medicaid settlement was $375,000
  - Alleged conduct occurred from 2011 – 2015
  - Allegations originated from qui tam lawsuit

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Recent FCA Cases in PAC – Hospice

- 03/04/2020 – Interim Healthcare of Atlanta - $1.75 M Settlement
  - Resolves allegations that:
    - Medicare and Medicaid billed for patients who were ineligible for hospice
    - Unlawful payments made to a referring MD in violation of the Anti-Kickback Statutes
    - MD was paid as a "back up" medical director, but did not perform legitimate service
    - Hospice put financial interests above the needs of patients
    - Company set aggressive goals for enrolling patients and failed to supervision admission practices of staff and medical directors
  - Alleged conduct occurred between 2013 and 2017
  - Case arose from qui tam lawsuit filed by 2 former employees

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Recent FCA Cases in PAC – Hospice

- 07/08/2020 – Hope Hospice – $3.2 M Settlement
- Settlement resolves allegations that:
  - Medicare, Medicaid and TRICARE billed for patients who were not terminal
  - Some billed for 4 years or more although not hospice eligible for entire stay
  - General Inpatient Care billed although not medically necessary
- Alleged conduct occurred 01/2011 – 06/2016
- Provider agreed to enter into a Corporate Integrity Agreement

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Recent FCA Cases in PAC – Hospice

- AseraCare FCA Case Update
  - FCA case began in 2008 with 3 whistleblowers and a qui tam complaint
  - Government intervened in 2012
  - Allegations that AseraCare certified patients who were not terminally ill
  - Original overpayment plus damages set at $200 million
  - 09/2019 – Decision in 11th Circuit Court of Appeals – disagreements between physicians regarding terminal prognosis does not equate to a false claim
  - 03/2020 – AseraCare settled with the DOJ for $1 million

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Recent FCA Cases in PAC – Home Health

- 11/05/2019 – Health Care Options – $2.5 M Settlement
  - Settlement resolves allegations that:
    - Fraudulent claims for home health care submitted to Medicare and Medicaid
    - Face to Face encounters between patients and physicians were not completed
  - Alleged conduct occurred between 2011 – 2018
  - Case arose from a whistleblower lawsuit

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Recent FCA Cases in PAC – Home Health

- 06/10/2020 – Noble Home Health Care – $111,200 Settlement
- Settlement resolves allegations that false claims were submitted to Maine's Medicaid program
- Allegations included:
  - Claims submitted for services provided to children with mental health diagnoses without the necessary mental health licensure
  - Provider was informed he lacked the license to bill, but continued to do so
  - Services were provided without a license from 05/2016 – 09/2016

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OIG Compliance Audits – Home Health

- HHA Compliance Audits due to high error rate per CERT
  - 04/2020 – Residential Home Health – multiple locations in mid-west
    - Calendar years 2014 and 2015
    - $2 M extrapolated overpayment based on 11 improper claims (out of 100)
    - Patients not homebound or in need of skilled services
  - 08/2020 – Mission Home Health of San Diego
    - Calendar years 2015 and 2016
    - $5.9 M extrapolated overpayment based on 32 improper claims (out of 100)
    - Patients not homebound or in need of skilled services, incorrect payment codes, and inadequate documentation

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OIG Compliance Audits – Home Health

- HHA Compliance Audits due to high error rate per CERT
  - 08/2020 – Condado Home Care Program, Puerto Rico
    - FY 2016 and 2017
    - $2.4 M extrapolated overpayment based on 14 improper claims (out of 100)
    - Patients not homebound or in need of skilled services, incorrect HIPPS codes billed, and Plan of Care noncompliant
  - 09/2020 – Mercy Health Visiting Nurse Services, Michigan
    - Calendar years 2016 and 2017
    - $1.1 M extrapolated overpayment based on 23 improper claims (out of 100)
    - Patients not homebound or in need of skilled services

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Recent FCA Cases in PAC – Other

- 10/02/2020 – Williamsburg and Euro PT – $4 M Settlement
  - Allegations include:
    - False claims billed to Medicare, Medicaid, FECA and FEHBP from 2008 to 2018
    - PT provided or supervised by someone other than the PT identified on the claim, included unlicensed aides
    - Defendants wrongfully backdated services after treatment authorization expired
    - Company operated 7 locations around New York City
  - Settlement encompasses 2 owners and their management company
  - Federal
  - Case resulted from qui tam lawsuit filed by 2 relators

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Enforcement Trends

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Enforcement Trends – 2019 FCA Cases

- FCA Recoveries in FY 2019
  - Total recoveries - $3 B
  - Recoveries from the healthcare industry - $2.6 B (85%)
  - Healthcare industry likely to remain a top focus in FCA enforcement
  - Nearly 75% of recoveries came from qui tam lawsuits
  - Largest settlements were with pharmaceutical and medical device companies
- FCA Recoveries in FY 2020
  - With the advent of the COVID-19, DOJ enforcement efforts appeared to have declined since the second quarter of the calendar year

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Enforcement Trends – CERT Error Rate FY 2019

- FY 2019 Improper Payment Rates in Medicare Fee for Service
- Overall: 7.25%
  - SNF: 8.5%
    - Inpatient: 8.7%
    - Part B (I/P): 6.5%
    - Part B (O/P): 14.1%
  - Home Health: 12.1%
  - Inpatient Rehab Facilities: 34.9%
  - Hospice: 9.1%
    - Hospital based: 18.9%
    - Non-hospital based: 8.9%

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Enforcement Trends – Potential Criminal Liability

DOJ Pursuit of Criminal Charges in Some SNF FCA Cases

DOJ is looking to identify criminal charges that can be brought alongside of civil FCA cases

- Criminal charges may be pursued in cases with allegations of abuse and fraud against elderly patients
- FCA cases involving grossly substandard (worthless) care or services not rendered may also warrant parallel criminal prosecution

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Enforcement Trends – COVID-19 Related Risk

DOJ Attorney General Barr Press Release – March 20, 2020

- Urges the public to report COVID-19 fraud
- Directed US Attorneys to prioritize COVID-19 fraud schemes
- Coronavirus Fraud Coordinator appointed in each district
- National data base maintains complaints for DOJ and law enforcement access
- Goal: detect, deter and punish wrongdoing

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Enforcement Trends – COVID-Related Risk

- DOJ Civil Fraud Division – Speech by Assistant AG – 06/26/2020
  - FCA will be used against:
    - Those who commit fraud related to COVID-19 stimulus funds or Provider Relief Funds
    - Private equity firms that take an active role in illegal conduct of acquired company
    - Nursing homes that provide grossly substandard care to their residents
  - https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims

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Enforcement Trends – COVID-19 Related Risk

- Potential for FCA Risk and Other Liabilities
  - Infection Prevention and Control under COVID-19
  - Stimulus Efforts
    - Handling of stimulus checks from IRS
    - Medicare Accelerated and Advance Payments
    - Paycheck Protection Program
  - CARES Act Provider Relief Funds

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Enforcement Trends – COVID-19 Related Risk

- CARES Act Provider Relief Funds – Compliance Considerations
  - Receipt of unsolicited funds
  - Attestation to Terms and Conditions
  - Delayed and changing guidance
    - Proper use of grant funds
    - Definitions of COVID-related expenses and "lost revenue"
    - Reporting requirements
  - Single audit implications
  - Potential Reverse FCA liability for retaining excess funds

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Enforcement Trends – COVID-19 Related Risk

- 03/04/2020 – CMS Prioritized Inspection Protocols
  - Infection Prevention and Control surveys
- 10/09/2020 – OSHA proposed $900k in COVID-19 penalties
  - 62 entities
  - Multiple states
- 05/2020 and 06/2020 – OIG added nursing home audits to work plan
  - Audits will focus on Infection Prevention and Control Programs

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Enforcement Trends – COVID-19 Related Risk

- Maryland Nursing Homes Surveyed by State
  - 64 nursing homes (out of 226) found to have failed to take sufficient infection control measures to protect residents from COIVD-19
  - 10 faced significant fines, ranging from $70,000 to $380,000
- Massachusetts: Soldier's Home in Holyoke
  - 174-page report issued June 2020
  - 247-bed nursing home (all residents were veterans), with 76 resident deaths
  - Combined two floors of residents, mixing those with and without COVID

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Enforcement Trends – COVID-Related Risk

- COVID-19 – Department of Justice Priorities
  - DOJ must remain vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis
  - A "Coronavirus Fraud Coordinator" will be appointed in each district to coordinate enforcement and conducting public outreach and awareness
  - Established a national system for whistleblowers to report suspected fraud
  - FCA actions involving fraud relating to COVID-19 will be prioritized

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Enforcement Trends – COVID-Related Risk

- The CARES Act included provisions to fight fraud
  - New entities created to oversee programs and investigate potential fraud:
    - Special Inspector General for Pandemic Recovery
    - Pandemic Response Accountability Committee
    - Congressional Oversight Commission
  - The US Comptroller General was also given authority to audit the use of CARES Act funds

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Enforcement Trends – COVID-Related Risk

- Proper use of Section 1135 Blanket Waivers and Flexibilities
- Infection Prevention and Control
- CARES Act Provider Relief Funds
- Other Stimulus Funds
- Increased use of telehealth

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Enforcement Trends – SNFs and HHAs

Changeover to New PPS Payment Methodologies

- SNFs changed to PDPM effective 10/01/2019
- HHAs changed to PDGM effective 01/01/2020
- Both new systems focus on value-driven vs. volume-driven payment
- Payments are not based on therapy utilization
- Payments to be based on patient characteristics not service utilization
- Changes in payment methodologies will result in learning curve and potential for an increased risk of errors

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Compliance Challenges and New Areas of Risk

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Compliance Challenges and New Areas of Risk

- COVID-19 Infection Prevention and Control
  - 12,000 facilities reported staff and resident cases (as of Aug 9)
  - 188,954 resident cases
  - 48,215 resident deaths
  - 41 % of COVID deaths in US occurred in nursing homes

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Compliance Challenges and New Areas of Risk

- CMS (as of September 16)
  - 22 guidance documents –weekly calls with nursing homes
    - 9 in 2019
  - Mandated reporting about COVID cases, deaths and supply levels (line listing)
  - Mandatory staff testing
  - Staff task force teams to share best practices
  - Distributing over 21 billion- more than 1.5 million on average
  - 14-day supply of PPE to 15, 000 nursing homes

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Compliance Challenges and New Areas of Risk

- CMS- Survey
  - $15 million in CMP to more then 3400 nursing homes
  - 15,276 infection control surveys conducted (99.2% of nursing homes)
    - March 4- August 14
    - 180 IJs (triple the rate of 2019)
      - $10 million in 22 states- average was $55,000
    - Fines for repeat infection control findings at lower level scope
  - Mandatory CDC reporting
    - 3,300 deficiencies- $5.5 million in CMP (As of August 3)
    - 99% response rate

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Coronovirus Commission for Safety and Quality in Nursing Home- MITRE Report (September 2020)

- Main purpose: lessons learned from early days of the pandemic
  - 25 commission members from across the country and diverse expertise
  - 10 themes- 27 principal recommendations paired with 100+ specific action steps
    1. Testing and screening
    2. Equipment and PPE
    3. Cohorting
    4. Visitation
    5. Communication
    6. Workforce: stopgaps for resident safety
    7. Workforce: strategic reinforcement
    8. Technical assistance and quality improvement
    9. Facilities
    10. Nursing Home Data

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Compliance Challenges and New Areas of Risk

Living with a Quality of Care CIA during COVID-

- TRANSPARENCY, TRANSPARENCY and TRANSPARECY
  - Role of the OIG and Federal Monitors
- Don't believe everything that you read
- Maintain a clear timeline
- Chart audit- lessons learned

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Compliance Challenges – Response to COVID

"Back to Basics":

- Risk Assessment- new areas of potential concern?
- Exclusion checks
- Disclosure Program
- Code of conduct
- Dashboard

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Compliance Challenges and New Areas of Risk

- Compliance committee
  - Are the right people on the Committee?
- Staffing and Staff Morale
  - Evaluate staffing and additional staffing needs
  - Staff mental health and counseling
  - Community support
- Family communication
  - Designated staff
  - Involve family/family council

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Compliance Challenges and New Areas of Risk

- PPE
  - Burn Rate calculations (CDC.gov)
    - Estimates how many days a PPE supply will last given current inventory level
    - Potential need based on highest utilization
    - Clear optimization Strategy
- Technology
  - Data Resources
    - Observing trends to be proactive
    - Quality of Care trends as a result of COVID
      - Weight loss
      - Pressure wounds
      - Depression
  - Line Listing and Testing Data
  - Resident quality of life/ activities
  - Opportunities for telemedicine

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Compliance Challenges and New Areas of Risk

- Emergency Preparedness
  - COVID Leader
  - Cohorting plan/Bedboard
  - Staffing
    - On call rooms
    - Transportation
    - Local hotel
  - Contracts
    - Refrigerator truck
    - Morgue/funeral homes
  - Media Strategy

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False Claims Act Liability in Post-Acute Care

Questions?

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