Qui Tam Defense

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Health Care Enforcement Defense Practice | *Health Law & Policy Matters* blog

JANUARY 2014

Mintz Levin Health Care *Qui Tam Update*

Recent Developments & Unsealed False Claims Act Cases

BY KEVIN MCGINTY, BRIAN DUNPHY, RACHEL IRVING

Trends & Analysis

- We have identified 31 health care–related *qui tam* cases unsealed since last month's *Qui Tam Update*. Of those, only six were filed in 2013. The majority (14 cases) were filed in 2011 or 2012, with the remainder dating back as far as March 2006.
- These 31 cases were filed in 16 states. Several cases were filed in historically active jurisdictions for false claims act cases, including the Eastern District of Pennsylvania and the Southern and Eastern Districts of New York.
- The government declined to intervene in a large majority of cases. Among the 31 unsealed cases where the unsealed filings included the government's decision on intervention, the government intervened, or intervened in part, in only seven cases.
- Subject matter of claims:
    - Twenty-one of the 31 recently unsealed cases involved both state and federal claims.
    - Eight of the cases (25%) were filed against pharmaceutical manufacturers.
    - Five of the 31 reviewed cases (approximately 16%) asserted claims against hospitals, hospital management companies, and community health centers.
- Identity of relators:
    - More than 75% of the relators in these 31 cases were employees or former employees of the defendants.
    - Several relators were physicians either employed by or affiliated with defendants.

Recently Unsealed Cases

***United States ex rel. Davis v. Centennial Pediatrics, P.C.*, No. 3:10-cv-00858 (M.D. Tenn.).**

Complaint Filed: September 13, 2010

Complaint Unsealed: November 21, 2013

Intervention Status: The United States and the State of Tennessee elected to intervene in part for purposes of settlement.

Claims: Relators assert that the defendants violated the FCA, 31 U.S.C. § 3729 *et seq*., and the Tennessee Medicaid False Claims Act, T.C.A. § 71-5-182 *et seq*. Relators also assert common law claims for, among other things, unjust enrichment, payment by mistake, recoupment, disgorgement of illegal profits, fraud, and conversion.

Name of Relators: Gordon Davis, M.D., Mark Hughes, M.D., and Gabriel Morel, M.D.

Defendants' Business: Defendant Centennial Pediatrics, P.C. ("Centennial") owns and operates 13 medical offices providing pediatric services. Edward Hamilton, M.D. is the majority shareholder and managing officer of Centennial.

Relators' Relationship to Defendants: All three relators are former employees of Centennial.

Relators' Counsel: Miller & Martin, PLLC

Summary of Case: Relators allege that Dr. Hamilton, through Centennial, knowingly upcoded bills to Tennessee's Medicaid program (TennCare) for infant auditory screening exams by billing for comprehensive auditory exams, but it only performed less expensive auditory screens. Relators also allege that Centennial clinics upcoded bills for urinalysis sample testing as though its office had performed a microscopic examination of the sample although no microscopy had been performed. Finally, the complaint asserts that Dr. Hamilton and Centennial billed for separate vaccinations when these vaccinations were administered as one shot through a "combination vaccination" (in which one shot includes inoculations against several diseases).

Current Status: On November 22, 2013, the Federal Bureau of Investigation announced[1] that Dr. Hamilton pleaded guilty in U.S. district court to a misdemeanor count of health care fraud and also entered into a civil settlement. As part of the criminal plea and civil settlement, Dr. Hamilton is excluded from participation in all federal health care programs for 20 years and must pay criminal restitution and FCA damages totaling more than $1.6 million. In the plea agreement, Dr. Hamilton admitted that he was informed on several occasions that the infant audiology screening was not being performed as billed. And Centennial physicians also notified Dr. Hamilton of the improper urinalysis billing at Centennial's pediatric clinics, but Dr. Hamilton nonetheless directed Centennial to continue to bill the higher reimbursement codes.

After the government partially intervened in the FCA case for purposes of settlement, on November 21, 2013 (the day before the FBI announced the criminal and civil resolution) the relators filed a stipulation of dismissal and dismissed the FCA case. The court dismissed the case on November 22, 2013.

Reasons to Note the Case: The case is an example of civil and criminal resolution of conduct brought to the government's attention through a *qui tam* complaint, which the government verified through an investigation. In addition, the government's coordinated investigation of relators' allegations exemplifies the extensive coordination among state and federal enforcement agencies often brought to bear when investigating *qui tam* complaints. This case was investigated by the Department of Health and Human Services Office of Inspector General, the FBI, the Tennessee Bureau of Investigation, the Tennessee Attorney General's Office, and the U.S. Attorney's Office for the Middle District of Tennessee.

***Dalitz v. AmSurg Corp.*, No. 2:12-cv-02218 (E.D. Ca.).**

Complaint Filed: August 27, 2012

Complaint Unsealed: November 1, 2013

Intervention Status: The United States and California declined to intervene on October 25, 2013.

Claims: Violations of the FCA, 31 U.S.C. § 3729 *et seq.,* and the California False Claims Act, Cal. Gov. Code § 12650 *et seq.*, based on false certifications of compliance with federal and state requirements for ambulatory surgery center (ASC) operations and standards of practice, conspiracy to submit false claims, and retaliatory termination.

Name of Relators: Douglas Dalitz, CRNA and Randy R. Gray, CRNA

Defendants' Business: Defendant AmSurg Corp. manages and develops ASCs by partnering with independent medical practices that own ASCs and providing them with management and operational services. The named physician defendants are surgeons who performed endoscopic procedures for patients at an AmSurg partner ASC, defendant Redding Gastroenterology d.b.a. Redding Endoscopy Center (owned by defendant Gastroenterology Associates Endoscopy Center of Nashville, Tennessee).

Relators' Relationship to Defendants: The relators are Certified Registered Nurse Anesthetists (CRNAs) and former employees of an AmSurg partner ASC.

Relators' Counsel: Arnold Law Firm

Summary of Case: The relators assert that the defendants made knowingly false certifications of compliance with federal and state law requirements for ASC operations and standards of practice when they submitted claims for payment to the Medicare and Medi-Cal programs, in violation of both the federal and California FCA. The relators claim that the defendants were focused on profits over safety, quickly moving patients through the ASC without complying with federal and state requirements for ASCs. Specifically, the relators allege that the defendants did not properly complete pre-surgical patient assessments, collect patient data, or update patient charts to permit the relators to properly perform their CRNA duties. They also allege that the defendants did not provide post-procedure care that complied with federal regulations, asserting that patients were not observed by properly qualified care providers during that time. Finally, the relators assert they were terminated after confronting the defendants regarding the alleged violations. Notably, the relators allege that the actions at one AmSurg partner ASC represent standard practices for all AmSurg ASC facilities.

Current Status: Pending.

Reasons to Watch: As we have discussed in past *Qui Tam Updates*, many FCA cases are based on a defendant's allegedly false certification (express or implied) of compliance with a law, when compliance was a precondition to a claim for payment to the government. This area of the law is unsettled, and federal circuit courts of appeals have articulated different standards for "certification." In this case, in addition to non-compliance with federal regulations governing ASCs, the relators also base their false claims allegations on the defendants' non-compliance with state licensure laws, applicable standards of care, and CMS's *Clarifications to the Ambulatory Surgical Center (ASC) Interpretive Guidelines – Comprehensive Medical History & Physicians (H&P) Assessment* (Interpretive Guidelines). The relators also claim the defendants' failure to comply with federal and state laws and guidelines hindered the relators' ability to comply with CRNA practice group rules and guidelines governing their scope of practice. Whether the relators successfully assert federal and state FCA claims based on allegations of false certification of compliance with a host of regulatory schemes and non-regulatory guidance bears watching because a central tension in FCA certification cases is whether the regulation (or statute or contract provision) allegedly violated was material to the government's decision to pay the claim.

***United States ex rel. Renfree v. Brown Hand Center*, No. 4:10-cv-00527 (S.D. Tex.).**

Complaint Filed: February 19, 2010 (Amended Complaint filed March 25, 2011)

Complaint Unsealed: November 8, 2013

Intervention Status: On October 24, 2013, the United States elected to intervene only as to the claims relating to Brown Hand Center's submission of false claims to the Medicare program. The government declined to intervene as to the claims against the numerous co-defendants and as to the claims alleging submission of false claims to Medicaid. The relator stated in a recent court filing that Texas and Nevada have declined to intervene, but the public docket does not include a notice of either state's intervention decision.

Claims: Violations of the FCA, 31 U.S.C. § 3729 *et seq.*, and analogous state laws in Nevada and Texas based on overbilling, fraudulent billing for procedures not performed, upcoding, unbundling, duplicate billing, and fraudulent use of modifiers.

Name of Relator: Kevin Renfree, M.D.

Defendants' Business: Brown Hand Center consists of affiliated medical practices in Texas, Nevada, and Arizona, specializing in the surgical treatment of Carpal Tunnel Syndrome. Brown Hand Center was founded by Michael G. Brown, M.D., a former hand surgeon.

Relator's Relationship to Defendants: The relator is a hand, microvascular, and upper extremity surgeon, with no apparent relationship to defendants, but the relator had the opportunity to review records of Brown Hand Center patient(s) after personally examining a former patient within weeks of a surgery performed at Brown Hand Center.

Relator's Counsel: Dewey & LeBoeuf (which is now defunct); Cohen Milstein Sellers & Toll PLLC.

Summary of Case: The relator alleges that the defendants' fraudulent billing practices violated the federal FCA and analogous state laws in Texas and Nevada. Specifically, he claims that the defendants (1) billed for medical services that were not performed or were medically unnecessary, (2) unbundled services by billing separately for procedures that are intended to be performed together and billed under a single code, and (3) used improper CPT code modifiers to submit duplicate claims and to "upcode," or submit claims for a higher

level of service than was actually provided. The relator further contends that the defendants aggressively sold and marketed their services to patients for whom the procedures may not have been medically necessary and used identical form language in operative reports written by different surgeons in different Brown Hand Center locations.

Current Status: The matter was stayed on October 30, 2013 as to the defendant and claims for which the United States intervened because Brown Hand Center is in Chapter 11 Bankruptcy proceedings. Relator filed a Motion to Stay the proceedings for all remaining allegations on November 20, 2013, but there is no related order on the court's docket.

Reasons to Watch: Although the United States only intervened for the Medicare-related claims against Brown Hand Center and the court granted its Motion to Stay pending Brown Hand Center Bankruptcy proceedings, the relator stated in his November 20, 2013 Motion to Stay that he intends to pursue all claims against the remaining 38 defendants and the Medicaid-related claims against Brown Hand Center. The case is noteworthy because the relator has no apparent relationship to the Brown Hand Center, but he personally examined a former patient within weeks of a surgery performed at Brown Hand Center and asserts that he found no proof that the procedures reported and billed for were actually performed by Brown Hand Center's affiliated physician. The complaint also discusses and attaches operative reports, insurance claim forms, and billing reports for a number of other patients; it is not evident how the relator obtained this information.

In addition, if the court were to reach the merits of some of the relator's allegations — in particular his claim that the presence of substantially similar language in various operative reports supports an inference of false and fraudulent claims — the potential findings could have far-reaching implications for providers who perform routine procedures and use standard descriptions for these procedures.

For more information, including details relating to the above cases, please contact **Hope S. Foster** at **202.661.8758** or HSFoster@mintz.com.

About Our Health Care Enforcement Defense Practice

Mintz Levin's Health Care Enforcement Defense Practice is comprised of health law, employment, and white collar defense attorneys with experience in government investigations and health care regulatory compliance matters. We regularly help clients conduct internal investigations designed to detect and correct problems before the government becomes involved. We have represented clients in federal and state government investigations and litigation across the country in matters initiated by the Criminal and Civil Divisions at the Department of Justice, United States Attorneys, the Office of Inspector General for the Department of Health and Human Services, the Drug Enforcement Administration, State Attorneys General, Medicare and Medicaid contractors, and the 50 Medicaid Fraud Control Units. We have helped clients avoid potentially ruinous civil fines, incarceration, other criminal and administrative penalties, and exclusion by combining our regulatory knowledge with our investigative, employment-related and litigation capabilities.

* * *

Endnotes

[1] Press Release, Federal Bureau of Investigation, Prominent Nashville Pediatrician and Former Owner of Centennial Pediatrics Pleads Guilty to Health Care Fraud (Nov. 22, 2013), *available at:* http://www.fbi.gov/memphis/press-releases/2013/prominent-nashville-pediatrician-and-former-owner-of-centennial-pediatrics-pleads-guilty-to-health-care-fraud

Boston · London · Los Angeles · New York · San Diego · San Francisco · Stamford · Washington www.mintz.com

Follow Us

Feedback: Was this mailing helpful?

3622-0114-NAT-HL