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A BLUNT TOOL THAT IS HERE TO STAY:
The False Claims Act As A Tool To Enforce Quality Of Care

Falling short of quality standards routinely subjects physicians and hospitals to costly medical malpractice lawsuits, but it can also lead to the far more serious jeopardy of False Claims Act (the "Act") prosecution. The Act is a potent weapon. It exposes wrongdoers to treble damages, fines of $5,000 to $10,000 per claim, healthcare program ineligibility and even possible criminal prosecution. But is it appropriate to apply the Act to penalize a healthcare entity for billing services that the government deemed to be substandard? Where do we find the definition of care that meets the Act's standards?

THE ACT AND QUALITY OF CARE

The Act dates back to the Civil War and was originally designed to protect the government from accepting worthless goods. It imposes liability on anyone who submits or "causes to submit" an erroneous claim to the federal government with knowledge of its inaccuracy. The government does not need to prove actual knowledge or specific intent to defraud, only deliberate ignorance or reckless disregard. The statute also rewards whistleblowers. The government shares 15 to 25 percent of the damages recovered with private citizens, called relators, who bring the fraud to the government's attention. The lure of a large reward serves as a strong incentive to disgruntled patients or employees, not to mention those whose loyalty may be compromised by any hint of a jackpot.

The Act's use as a tool to prosecute fraudulent and defective healthcare claims (e.g., claims where no services were provided) is well-established. But in the mid-1990s, the government began prosecuting nursing homes for violating the Act by seeking Medicare reimbursement for patients who received inadequate care. A decade later, the Act has become the federal government's chief weapon in policing the quality of healthcare provided by professionals and facilities.

DON'T HIDE YOUR HEAD IN THE SAND

The government has publicly stated that it will continue its prosecution of quality of care cases under the Act, specifically cases concerning the failure to report quality data, the use of physical and chemical restraints and services performed by non-licensed personnel. Now that quality of care is once again in the healthcare spotlight, hospitals and other providers must assume that allegations of inadequate care will trigger False Claims Act prosecutions. Some suggestions for avoiding federal jeopardy:

- **New demands on providers to report quality of care data should be treated seriously. *All* requested information, even what is potentially damaging, should be reported and reported accurately.** Most reports require actual certification. Fulfillment of this responsibility requires the cooperation of a hospital's high-level management and board of directors. The failure to provide thorough information may affect the government's decision when seeking an appropriate remedy. Concealment of such information will be considered evidence of illegal intent.
- **Educate your workforce, including top management, on their False Claims Act exposure. There are risks beyond billing accuracy. Medical data reporting, restraint and seclusion, outcomes analysis, and other quality of care requirements are fair game.** Providers have always endeavored to render quality of care in accordance with their mission statements and ethical principles. Historically, however, quality of care issues have been regulated by the state as matters of licensure. Providers have come to expect to deal with quality of care concerns as part of a licensure survey or consumer complaint. The use of the Act to penalize inadequate care has raised the bar for providers to report and deal with any quality issues as they arise.
- **Where instances of substandard care are identified, vigorous and immediate remedies should be applied and documented. Lapses in quality are inevitable. How those lapses are dealt with can be the difference between federal prosecution and a passing grade.**

There are good legal arguments to support a challenge to the use of the Act to prosecute providers based on inadequate care. For instance, state regulators and prosecutors regularly address the concerns of inadequate care by challenging a facility's state license for gross incompetence or the failure to comply with care and treatment standards enforced by their agencies. These prosecutors have everyday familiarity with the quality standards they are called upon to uphold.

Given state and other federal remedies more suited to address quality of care, the False Claims Act arguably is too blunt a tool to be used in the enforcement of quality of care. Nevertheless, as a weapon against inadequate quality, the False Claims Act is here to stay, and providers should be prepared.

If you have a question on this material, or would like to discuss legal services, please contact us at healthcare@duanemorris.com

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Originally published as a special supplement to Modern Healthcare Magazine, February 2007.