

## Hospital's Medicare Woes Signal Shift In Feds' FCA Tactics

By Rachel Slajda

*Law360, New York (February 13, 2013, 8:44 PM ET)* -- An unusual, recently settled criminal case targeting a North Carolina hospital over a common Medicare patient classification problem should put hospitals on alert that federal prosecutors are renewing their 1990s-era scrutiny of hospital billing practices, experts say.

Last week, a judge approved a settlement deal with WakeMed Health and Hospitals, including a two-year deferred prosecution on charges of making materially false statements, an \$8 million payment to the government and a corporate integrity agreement.

WakeMed's Raleigh facility, a community nonprofit hospital, drew the attention of regulators in 2007 by having the state's highest rate of inpatient stays of only a few hours, known as zero-day stays in Medicare parlance. An audit found that WakeMed had been admitting patients and billing Medicare at higher inpatient rates, either without a doctor's orders to admit the patients or even against doctors' orders to treat them as outpatients.

The regulations governing when a visit can be billed as inpatient are complex and ambiguous, and the issue comes up often in False Claims Act cases, experts say. But this case is unusual in multiple ways: First, these cases are almost always civil, rather than criminal, and second, the hospital agreed to pay \$8 million, almost seven times the amount of the alleged overpayments of \$1.2 million. That's more than even the treble damages that makes the FCA so fearsome to providers.

"This is a pretty unusually harsh result. ... It's puzzling how this case is different from the civil cases," said Kathleen McDermott, a partner at Morgan Lewis & Bockius LLP and former health care fraud coordinator for the Department of Justice.

Robert Salcido, a partner at Akin Gump Strauss Hauer & Feld LLP and former trial attorney in the DOJ's civil fraud unit, said criminal charges are usually only seen in very large settlements, such as the \$950 million Merck paid for its promotion of Vioxx, or against "fly-by-night" operators who are more scammer than health care provider. Criminal cases are much harder to prove than civil claims, given the need to show an intent to defraud the government, he said, which goes to show why the majority of false claims cases are civil.

But the government has serious leverage in getting companies to enter into criminal plea agreements. Companies that go to trial are risking a conviction and potential exclusion from the Medicare program, which would be a death sentence for providers. The aggressiveness of the case, along with a few other national initiatives enforcers have undertaken recently, signals that the government may be once again focusing on hospital billing issues as a fertile ground for FCA and even criminal cases, McDermott said.

"I think after 20 years of the war on health care fraud and corporate compliance programs ... the government might be impatient with repetitive billing and other types of fraud issues by institutions that have a responsibility to have good compliance practices," she said.

Hospital billing cases were a major focus of the DOJ in the 1990s. One major initiative focused on hospitals that billed for outpatient services even though they were conducted while a patient was admitted to the hospital, essentially double-billing Medicare. The investigation resulted in settlements with more than 2,000 hospitals nationwide.

In more recent years, however, the focus has trended more toward the pharmaceutical industry, with FCA litigation tied to off-label promotion and the like. That's not to say hospital billing has fallen off the radar entirely, but it's clear the bulk of recoveries — nearly all of the \$4.2 billion recovered in 2012, for example — come from major pharmaceutical company settlements.

But there are signs that billing is coming back into the spotlight. Inpatient status has been the focal point of a nationwide investigation into kyphoplasty procedures, a spinal surgery that can be done on an outpatient basis. The government has won \$50 million in settlements from dozens of hospitals around the country for allegedly performing the surgeries on an inpatient basis in order to collect more from Medicare.

Another is the continuing, nationwide investigation into cardiac hospitals for their practices regarding implantable cardioverter defibrillators. The DOJ has suggested that hospitals have been treating Medicare patients with the expensive devices even when patients didn't meet Medicare's requirements for medical necessity. Last year, it asked hospitals around the country to look at their practices over the last several years and estimate their potential liability under the FCA.

As for the WakeMed case, it's unclear why the hospital's alleged conduct rose to the level of criminal prosecution, experts say.

"Medicare short stays and the inpatient-versus-observation question is a very difficult regulatory area for hospitals," said Theodore Lotchin, an attorney with Arnold & Porter LLP's health care practice group. "If prosecutors felt like what they were seeing had criminal consideration, they must have seen behavior that went beyond misunderstanding of the rules."

McDermott was skeptical about the government's case, saying the public details of the alleged misconduct didn't, to her eye, show any significant difference from the cases that go the more common civil route.

"It's unclear whether it's factually very different, but that's really unknowable," she said. The government alleged that nurses were "instructed to ignore physician instructions on status. This is characterized by the government in a certain way ... but in the real world, doctors control the patient and where the patient stays. So to say a nurse disobeyed the doctor's instructions sounds a little like hyperbole."

The bottom line, experts say, is that hospitals should make sure their billing compliance policies are up to date and closely monitored, to prevent the government from coming calling.

“It's a good lesson that hospital billing issues are back and it would be important for hospitals to review their practices,” McDermott said.

--Editing by Elizabeth Bowen and Chris Yates.

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