

# MEDICARE COMPLIANCE

## Oncologist Gets 45-Year Prison Term in Medical Necessity Case

A Detroit-area physician is headed to prison for 45 years for billing Medicare and private insurers for chemotherapy and hematology services provided to patients who couldn't benefit from them. Hematologist-oncologist Farid Fata, M.D., pleaded guilty in September 2014 in connection with a scheme that included giving medically unnecessary infusions or injections to 553 patients, the Department of Justice said July 10.

Fata, who also was ordered to forfeit \$17.6 million, copped to 13 counts of health care fraud, one count of conspiracy to pay or receive kickbacks and two counts of money laundering.

Fata owned and operated a cancer treatment clinic, Michigan Hematology Oncology P.C. (MHO), which had seven locations. An indictment filed against him in August 2014 stated that Fata submitted false claims to Medicare for giving chemotherapy and other cancer treatments to patients whose conditions didn't support the treatments; administering intravenous immunoglobulin (IV/IG) therapy to patients who had conditions that did not support the therapy; and giving IV iron treatments to patients without an iron deficiency. The indictment wasn't detailed, but a year earlier, an FBI agent filed an affidavit in federal court that put meat on the bones of the case against Fata (*RMC 8/12/13, p. 1*). As part of its investigation of MHO, the FBI interviewed eight former or current employees of Fata, including an oncologist, several nurse practitioners, two medical assistants and a person "employed in a business capacity," according to the affidavit. Here are some of its allegations:

- ◆ *Fata ordered chemotherapy for "end-of-life patients,"* the affidavit said.
- ◆ *One patient allegedly was prescribed the cancer drug Velcade although the patient's cancer was inactive.*
- ◆ *99% of MHO patients allegedly received IV/IG, although only patients with low IgG (an antibody) should receive it.* Fata allegedly ordered "IV/IG treatment for life" to treat infections even though patients needed it for only a few months, the affidavit said. Sometimes records were allegedly falsified to justify IV/IG administration.

◆ *Patients were kept on the drug rituximab for idiopathic thrombocytopenic purpura,* a low-platelet condition. The affidavit said the drug is intended as a bridge to help patients while they wait for spleen removal. A former MHO oncologist told the FBI, "Dr. Fata does not tell patients about the long term solution of spleen removal and simply continues them on rituximab indefinitely, and for years at a time," the affidavit alleges.

◆ *After two patients went into remission, Fata allegedly ordered the continuation of a "maintenance dose" of chemotherapy for them,* the affidavit says. They left his practice instead.

Because Fata didn't plead guilty to every count in the indictment, it's unclear which patients are relevant to the guilty plea.

This is essentially a life sentence for Fata, who is 50, says Chicago attorney Tinos Diamantatos, a former federal prosecutor in the U.S. attorney's office there. "It was driven by harm to people who did not have cancer and were getting treatment for it, or who did have cancer and were getting ineffective treatment," says Diamantatos, with Morgan Lewis. "When you see that component, you see that judges are willing to sentence people to multiple decades." But it's imposed on a case-by-case basis; he doesn't think there's a trend toward the Department of Justice seeking to max out the Federal Sentencing Guidelines or request additional time for defendants.

The Department of Justice is racking up convictions and civil settlements in cases that have focused on lack of medical necessity. Sometimes they lead to long prison terms. On June 9, the former president of Riverside General Hospital in Houston was sentenced to 45 years in prison in connection with a Medicare fraud scheme, about three weeks after the hospital's former assistant administrator was sentenced to 40 years (*RMC 5/25/15, p. 7*). Earnest Gibson III, the former president, and others were convicted of conspiracy to commit health care fraud, conspiracy to pay and receive kickbacks, and related counts of paying or receiving illegal kickbacks. The Justice Department says between 2005 and June 2012, the defendants billed Medicare about \$158 million for services provided by the hospital's partial hospitalization

program (PHP). Patients didn't qualify for PHP services or need them and rarely saw a psychiatrist, according to evidence presented at trial.

### Surgeon to Pay \$4M, Is Excluded

Medical necessity was the driving force in the case against facial plastic surgeon Donald C. Proctor, M.D., and Grove Place Surgery Center, LLC, an ambulatory surgery center (ASC) he managed in Vero Beach, Fla. Proctor agreed to pay \$4 million to resolve allegations he violated the False Claims Act by billing Medicare for Mohs surgeries that were not medically necessary or were not performed and for additional stages of Mohs surgeries that were not medically necessary or performed from Jan. 1, 2006, to Dec. 31, 2011, the Department of Justice said June 17. Proctor also allegedly billed for adjacent tissue transfers that weren't medically necessary or performed. Mohs surgery is a special technique for removing certain kinds of skin cancers, including cancers that have returned, that are in certain areas of the body or are large tumors. It's designed to spare as much tissue as possible.

The false claims lawsuit against Proctor and the ASC was originally filed by two whistleblowers: plastic surgeon Ferdinand Becker, who referred patients to Proctor for Mohs surgery, and Linda Wildes, a former histology technician for Proctor.

"This is more confirmation that doctors are a new and critical *qui tam* relator and that doctors are turning on each other when they see inappropriate conduct," says Ed Gaines, chief compliance officer of Zotec Partners in Greensboro, N.C. (neither of which was involved in the case). Physicians often have the ultimate insider's view, as was the case here. Becker referred his patients to Proctor, so presumably he had first-hand knowledge of the medical necessity of his patients' Mohs surgery and what services were performed after they were referred to the ASC, Gaines says.

If physicians in your hospital or practice report that a colleague's billing or treatment patterns are outside the norm for his or her specialty, Gaines urges compliance officers to take it seriously. "Don't just write it off to their being trained differently or to different treatment approaches," he says. "The point is to find out where the outliers exist and the reasons behind them. The variation may be totally appropriate for clinical or other practice reasons." If it's a coding or documentation problem, bring in an outside auditor — someone who also has clinical expertise, such as a nurse, Gaines says. "It's hard for compliance officers to have all the expertise they need if they're not clinically trained," he says. If the audit suggests a potential pattern of medically dubious procedures, compliance officers should bring them to the medical director, he says. "You don't want to be in the position of questioning medical necessity without clinical support or input. You are not in your strongest advocacy position," Gaines says. "Let clinicians talk to clinicians about appropriateness of medical necessity. Use the data from their coding and billing to explain why they may be an outlier and understand the factors that may have caused it. Again, the difference could be perfectly legitimate."

In the settlement, Proctor also agreed to a five-year exclusion from Medicare and other federal health programs. His attorney, Michael Mustokoff, with Duane Morris in Philadelphia, says Proctor didn't admit liability in the settlement. "The settlement we reached was a compromise between the parties based on the difficulties the government would face in its proof and the anxiety any individual feels when placing the issues of professional expertise in the hands of a jury," Mustokoff says. "The scales of justice can be tipped by grains of sand."

Contact Diamantatos at [tdiamantatos@morganlewis.com](mailto:tdiamantatos@morganlewis.com), Gaines at [egaines@zotecmmp.com](mailto:egaines@zotecmmp.com) and Mustokoff at [MMustokoff@duanemorris.com](mailto:MMustokoff@duanemorris.com). To read about the Fata case, visit <http://tinyurl.com/p8d6wqj>, and for the Proctor case, visit [www.usdoj.gov/usao/fls](http://www.usdoj.gov/usao/fls). ♦