Clients&FriendsMemo

"Worthless Services" Can Be Costly: Nursing Facilities Enter Into CIA and Financial Settlement to Resolve False Claims Act Suit Under "Worthless Services" Theory Over Alleged Quality Issues

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Introduction

With reform of the delivery and financing of health care at the federal and state level under way, quality of care has increasingly become a significant component of reimbursement for providers and managed care plans (e.g., "pay for performance" and quality incentive initiatives). At the same time, quality of care has moved front and center as a compliance concern among regulatory and law enforcement authorities. As of March 23, 2013, all nursing homes participating in the Medicare and Medicaid programs must have adopted and implemented a comprehensive ethics and compliance program that covers, among other issues, quality of care.

This past December, GGNSC Holdings LLC and six of its affiliated nursing homes ("Golden Living") entered into a Corporate Integrity Agreement ("CIA") with the Office of Inspector General of the U.S. Department of Health and Human Services ("OIG") and agreed to pay $613,300 to settle a Federal and state False Claims Act ("FCA") action brought by the U.S. Department of Justice ("DOJ") and the State of Georgia. The settlement resolved the FCA claims based on allegations that two of the nursing facilities had provided inadequate and "worthless" wound care to its residents.

The Golden Living case represents only the latest installment of DOJ's aggressive use of the FCA to pursue "worthless services" actions, and is a sober reminder to providers and managed care plans that quality of care – both individual and systemic deficiencies – must be treated as a compliance priority. The legal, financial, operational, and reputational risks are significant if care deficiencies are not addressed or remediated through the entity's compliance program and become the predicate for a FCA lawsuit and an onerous CIA.

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Background

The plaintiff, Joseph L. Micca, M.D. ("Relator"), is a former physician and Medical Director at a Golden Living facility. The Relator filed a *qui tam* action in the United States District Court, Northern District of Georgia, alleging that seventeen patients at the nursing facility where he last served, and one other Golden Living facility, between January 1, 2006 and May 31, 2011, received care that was "grossly deficient and not of a quality which meets professionally recognized standards of care." View the Amended Complaint here. To support the contention that Golden Living's services were "worthless," the Relator claimed the following alleged deficiencies:

- failure of staff to administer ordered medications;
- failure to perform transfers in compliance with the physician's orders;
- failure to perform proper wound care;
- failure to monitor and prevent further deterioration of wounds;
- inadequate record keeping by nursing staff to allow for proper patient care;
- failure to provide adequate staffing to sub-acute patients; and
- backdating and falsification of medical records.

Relator further claimed that he had reported many of these deficiencies to Golden Living management, and that management did not act to correct the deficiencies. He also claimed that he was improperly terminated in retaliation for his reporting of this deficiencies.

The Relator's Complaint refers generally to "systemic" and "widespread" care deficiencies at the two facilities. Notably, the Complaint did not indicate whether at any point during the over 5-year span alleged in the Complaint, the Relator reported the alleged incidents of substandard care or resident harm to state or federal health care regulators. Nor is there any mention of whether any of the annual facility surveys performed by Georgia or federal surveyors during that time frame had cited deficiencies of the kind described in the Complaint.

The U.S. Attorney for the Northern District of Georgia intervened in support of the Relator's action on December 31, 2012.

Settlement

Shortly after the government intervened, the parties settled the FCA claims in the Complaint. Notably, under the terms of the settlement agreement, Golden Living did not admit liability. In its press release. Golden Living stated that it had "agreed to the settlement not to dignify [the] baseless charges, but because [it] would rather spend the money on [its] patient care and staff than on legal fees necessary each month to respond to the government's actions in the investigation." Golden Living emphasized that one of the facilities in question received a Four-Star Overall rating (out of Five stars) by CMS and a Five-Star Quality rating in the most recent Quality Ratings, while the other facility received a Three-Star Overall rating and a Four-Star Quality rating.[1]

That the government pursued this matter despite such positive ratings further demonstrates its apparent commitment to aggressively pursuing "worthless service" FCA matters involving nursing homes. Indeed, the U.S. Attorney's Office press release made clear that "[q]uality of care in nursing homes is a top priority for the Office of Inspector General . . . [and] [h]ealth care providers need to know that if they provide worthless services to those most in need, they will pay the price."

Golden Living CIA

The CIA entered into by Golden Living applies to six of its nursing facilities (the "Applicable Facilities") in Georgia, and remains in effect for five years. Pursuant to the CIA, these facilities are required to maintain or implement several compliance measures, some of which relate directly to patient care and nursing home operations, including:

1. *Maintaining a Chief Compliance Officer and Related Waiver of Privilege*: Notably, the Applicable Facilities agreed not to assert a privilege to OIG with respect to legal advice they obtain from the Chief Compliance Officer after entering into the CIA and during the term of the CIA regarding compliance with the CIA or Federal health care program requirements.

2. *Maintaining a Compliance Committee*: The Compliance Committee must conduct internal audits that include adoption of a quality of care "dashboard" and review of quality data, performance metrics, and quality tracking.

3. *Limiting use of part-time or contract staff*: The CIA requires the Applicable Facilities to ensure sufficient nursing staff levels while minimizing the number of temporary or contract staff, and to track the hours of employee staff versus non-employee caregivers.

[1] On January 31, 2013, CMS selected five Golden Living facilities in California, Pennsylvania, Virginia, and Wisconsin (these facilities were not defendants and are not subject to the CIA) among 160 nationwide to participate in its Bundled Payment Demonstration. *See* http://innovation.cms.gov/initiatives/Bundled-Payments/Participating-Health-Care-Facilities/index.html.

4. *Improving patient care*: The Applicable Facilities must implement supervised resident-turning schedules (to prevent bedsores or pressure ulcers), with turning occurring at least once every two hours. Staff also must take color photographs of all advanced pressure ulcers immediately upon discovery and take weekly follow-up photos thereafter. The Applicable Facilities must hire or contract with a clinical services consultant certified by the Wound Ostomy and Continence Nursing Certification Board.

5. *Mandatory Staff Training*: In addition to wound care training, affected staff members also must undergo 10 hours of training regarding proper care, CIA obligations, and the legal sanctions for failure to comply with the standard of care.

6. *Paying for the OIG-appointed Independent Monitor*: The OIG will appoint an independent monitor, compensated by the Applicable Facilities, to audit internal quality control, evaluate effectiveness of patient-care policies and procedures, and assess compliance with staffing requirements. The monitor will have immediate access to all residents and staff.

Ramifications

A "worthless services claim" brought under the False Claims Act is based on the proposition that "the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." Mike v. Strauss, 274 F.3d 687, 703 (2d Cir. 2001). In particular, it "is effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided." Id. One of the first successful prosecutions dates back to 2000, involving Vencor, Inc. ("Vencor"), one of the nation's largest operators of nursing homes and hospitals at the time.

Vencor settled with the U.S. Attorney's office and entered into a CIA with the OIG in the face of particularized allegations of widespread lack of patient care and allegations of fraud, involving numerous Vendor facilities across the country. By contrast, the Relator's Complaint against Golden Living includes only generalized allegations of "widespread" or "systemic" care and compliance problems, none of which in any event apply to any Golden Living facilities other than the two Atlanta-based facilities. In light of these differences, the aggressive approach taken by the OIG and DOJ against Golden Living may signal a greater willingness to prosecute FCA actions and impose a CIA — with its attendant reporting, oversight, and other (costly) burdens — predicated on a more limited record of individual quality lapses. Such willingness may especially exist in matters involving the quality of care in nursing homes, a top priority for the HHS Office of Inspector General as the press release attached earlier emphasizes.

Take Aways

As just noted, quality of care is a high priority for government regulators and prosecutors. As the Golden Living case illustrates, providers and managed care plans must have robust compliance programs that address quality of care and specifically promote timely reporting of care deficiencies, thorough investigation and remediation of any identified problems, follow up, and inservice training. Existing quality improvement committees and initiatives should be integrated into the corporate compliance infrastructure, to ensure that quality concerns are addressed as a compliance priority at the management and board level. If a broader problem, such as bedsores, is identified, providers need to develop a plan for corrective action that includes proactive measuring and monitoring the condition systemwide. Equally important, providers must document all steps taken in the compliance process, to help mitigate the risks, should the day come, when they have to defend a false claims action as in the Golden Living case.

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If you have any questions regarding the foregoing, please contact one of the following:

Brian T. McGovern	+1 212 504 6117	brian.mcgovern@cwt.com
Adam S. Lurie	+1 202 862 2461	adam.lurie@cwt.com
Jared L. Facher	+1 212 504 6494	jared.facher@cwt.com