Are You Liable?: a Guide for Consultants

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Based on recent civil and criminal enforcement actions, third-party medical billing companies, healthcare consultants, and medical coding personnel (collectively referred to as "consultants" throughout this article) need to be aware of potential liabilities when providing services to healthcare providers who participate in federal and state healthcare programs. Consultants also need to ensure that their insurance coverage-particularly their "errors and omissions" (E&O) coverage-is broad enough to respond to liability exposures arising from their services to Medicare/Medicaid providers. Following are examples of potential exposures for consultants plus discussion of what they should consider in determining the adequacy of their coverage.

What Are Consultants' Responsibilities?

In a recent, high-profile case involving Columbia/HCA, the Department of Justice intervened in a qui tam (whistleblower) action against KPMG Peat Marwick. The qui tam relator, a former Columbia/HCA executive, filed suit under the US False Claims Act (FCA) for allegedly preparing hospital cost reports that included false claims to Medicare. The complaint alleges that KPMG violated its duty to report known errors resulting in unwarranted federal payments and assisted Columbia/HCA in keeping funds to which it was not entitled. Plaintiffs also claim that KPMG performed reserve analyses to estimate the effect of the false claims and to reserve for any overcharges Columbia/HCA might have to return to the government. Columbia/HCA allegedly directed KPMG to conceal the existence of the reserve papers.

Accordingly, the complaint alleges that KPMG violated the FCA by knowingly presenting and causing to be presented false claims to the government for reimbursement and engaged in conspiracy in violation of various statutes. This is the first time the federal government has used the FCA to hold a consultant liable for aiding and facilitating a client's purported Medicare fraud.

The liability theory in the KPMG case raises two issues relevant to consultants: whether consultants have a duty to report known errors resulting in unwarranted payments to clients and whether consultants can be held liable under the FCA if they conspire with providers to "conceal" overpayments. While there is little precedent on these issues, current law does not appear to place an independent obligation on consultants to disclose known overpayments or misconduct on the part of clients. However, it seems equally clear that consultants who assist clients in submitting improper claims risk possible criminal and civil liability.

Consultants can glean guidance about their responsibilities from the OIG's Model Compliance Program Guidelines for Third-Party Medical Billing Companies, released in November 1998. The compliance guidance does not have the force of law, but provides recommendations for consultants who discover fraudulent conduct on the part of a client. Among the risk areas the OIG has identified are:

- billing for items and services not documented
- unbundling
- upcoding
- inappropriate balance billing
- inadequate resolution of overpayments

The compliance guidance provides that if consultants find evidence of misconduct on the part of clients, they should refrain from submitting questionable claims and notify the provider in writing within 30 days. This notification should include claim-specific information and the rationale for such a determination. However, if a consultant discovers credible evidence of a provider's *continued misconduct, or flagrant, fraudulent, or abusive conduct*, then the OIG recommends that consultants refrain from submitting any false or inappropriate claims, terminate the contract, and report the misconduct to the appropriate authorities within a reasonable time, but not more than 60 days after determining credible evidence of a violation. The OIG states that a consultant's "[f]ailure to notify authorities of an overpayment within a reasonable period of time could be

interpreted as an intentional attempt to conceal the overpayment from the government, thereby establishing an independent basis for a criminal violation with respect to the [consultant]..."

Thus, the OIG currently recognizes that consultants do **not** have a duty to disclose overpayments received by clients. However, the OIG expects, at a minimum, that the consultant will terminate participation in the provider conduct as soon as the consultant recognizes that the wrongful conduct has not been corrected or may continue. We believe the compliance guidance serves as a warning that consultants are not immune from prosecution for healthcare fraud.

In fact, there are several civil and criminal statutes traditionally thought to apply only to providers that may apply to consultants who are involved in submitting claims to or processing payments from Medicare/Medicaid. For example, 42 U.S.C.ß1320a-7b(a)(3) provides criminal penalties for whoever has knowledge of an event affecting:

> the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent to fraudulently secure such benefit or payment...

While there is no precedent interpreting this statute with respect to a consultant's failure to disclose known overpayments, an administrative judge upheld a physician's exclusion from Medicare after he pled guilty to "having knowingly concealed misrepresentations made on Medicare claims," even though he did not submit the claims. (See *Klein, M.D. v. Inspector General*, Dec.No.CR253 [March 1993]).

Additionally, Congress passed HIPAA, which added the specific crime of knowingly and willfully submitting false statements relating to healthcare matters. While there are no reported convictions under this provision, US v. Calhoon, 97 F.3d 518 (11th Cir. 1996) involves Medicare fraud under the predecessor statute, which prohibits false statements generally. Calhoon demonstrates that the government will inves-tigate a consultant's participation in the submission of claims that the consultant knows or should know would result in overpayments.

Finally, we note that providers who are found guilty of fraud may attempt to hold their consultants liable if they relied on the consultant to prepare and submit Medicare claims. A provider client may seek the reimbursement of fines paid to the government on theories of breach of contract, negligence, negligent misrepresentation, and fraud. In addition, if a provider is excluded from Medicare, the provider may seek damages for defamation or loss of income.

What Insurance Is Available?

Whether a healthcare consultant's E&O coverage provides a defense to the above-cited exposures or indemnification for damages or fines resulting from it would be determined by the policy's terms. First, it is important that the "claim" definition includes proceedings brought by the government, or "on behalf of the government," such as in the case of a Medicare/Medicaid intermediary. Many claim definitions are written to foreclose coverage for lawsuits/ investigations by or on behalf of the government. The consultant should also ensure the claim definition embraces investigations proceedings, because the government's enforcement efforts frequently come in this form, distinct from civil lawsuits. The claim definition may also exclude or "carve out" coverage for criminal matters. Few insurers are likely to provide such coverage, but the consultant's broker may be able to obtain coverage for expenses incurred in criminal matters.

The "loss" definition is also important to review. E&O policies may cover civil fines/penalties, including multiplied damages, imposed under the FCA. Most policies will not cover criminal fines/penalties, but these are assessed only in egregious cases. Similarly, some insurers purport to offer "restitution" coverage for the return of monies wrongfully collected from the government. However, such coverage may not be available, as it is against most states' public policies. Interestingly, even those carriers that do not cover restitution may cover penalties that are based on a multiple of the restitution amount.

The "defense expenses" definition should also be examined. While most policies cover "reasonable and necessary fees charged by an attorney," many claims brought by the government require the use of auditors and consultants (including PR consultants) whose costs may not be covered under defense expenses. Accordingly, consultants should review the breadth of coverage for accountants' or consultants' fees.

Finally, many E&O policies contain exclusions that preclude coverage for certain claims or allegations, such as government claims or fraud allegations. On the other hand, policies exist without such exclusions, tailored to cover FCA claims. Another

important exclusion to review is the "intentional acts" exclusion, which excludes coverage for dishonest, fraudulent, criminal, intentional or malicious acts. Because the FCA assesses liability based on intentional acts, an insurer may be able to cite the "intentional acts" exclusion as a basis to deny coverage. However, many policies carve out FCA claims from the intentional acts exclusion.

Consultants must not be blind to the government's enforcement efforts in protecting Medicare/Medicaid from fraud. While consultants have not been stung to the same degree as providers, the government has put consultants on notice that their activities are not immune from investigation. Consultants should ensure their E&O coverage is adequate to provide a defense to any government claim and perhaps provide coverage for civil fines/penalties. Any insurance broker specializing in professional liability coverage should be able to assist in finding the best, tailored coverage.

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