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NURSING HOME FRAUD: RESPONSIBLE WAYS TO INCREASE PROFITS IN NURSING HOMES

The government is working tirelessly to deter healthcare fraud in Skilled Nursing Facilities (“SNF”). The government is increasingly holding SNF’s liable for overbilling Medicare for medically unnecessary services and billing for services that were not provided. The government believes that SNF’s are committing Medicare fraud to increase profits in its facilities. To understand nursing home fraud, it is necessary to evaluate the False Claims Act (which is the leading body of law that SNF’s are held liable under), how SNF’s are reimbursed by Medicare, and SNF false claims liability for Medicare fraud. This perspective will then offer ways for SNF’s to increase profits legally and responsibly.

The False Claims Act. The False Claims Act1 (“FCA”) has become an effective weapon by the government to fight healthcare fraud in nursing homes.2 The FCA imposes civil liability on individuals or businesses that “knowingly present, or cause[] to be presented a false or fraudulent claim for payment or approval.”3 It permits the government to recover damages between $5,000 and $10,000 per claim.4 Claims include direct requests to the Government for payment and reimbursement requests made to the recipients of federal funds under federal benefits programs such as Medicare.5 Additionally, the FCA gives private citizens the opportunity to file a civil action on behalf of the government, called qui tam actions, which awards individuals a substantial amount of the damages that the government recovers.6 Nursing home liability under the FCA is commonly due to fraudulent requests for Medicare reimbursements.

Medicare Reimbursements to Nursing Homes. SNF’s receive reimbursements from the government through government federal health care programs such as Medicare.7 Nursing home patients are primarily covered under Medicare Part A or Part B. Part A covers services such as inpatient hospital care, skilled nursing facilities (i.e. nursing homes), and more.8 Part B

1 31 U.S.C. § 3729-3733
7 Id. (citing 42 U.S.C. § 1395c).
8 Nahon, Saharovich & Trotz, PLC, Medicare and Medicaid Fraud in Nursing Homes, NURSING HOME
covers outpatient services such as physical and occupational therapy services and certain home care.  

For purposes of reimbursements, patients are categorized into resource utilization groups ("RUGs"). RUGs determine a nursing homes daily reimbursement rate for certain patients where the more skilled services needed for a patient, the more the nursing home is reimbursed. The highest RUG requires at least 720 minutes per week. The services that Medicare reimburses “must be ‘deemed reasonable and necessary for the diagnosis or treatment of illness or injury’” Where nursing homes overbill for unnecessary services and are reimbursed for those services, they are held liable under the FCA.

**Nursing Home FCA Liability for Overbilling Medicare.** SNF’s commit health care fraud when it submits payments to Medicare for “unnecessary medical procedures or procedures that it never performed.” If a SNF bills the “United States for specific services that it never rendered[,] then that claim would be fraudulent and properly actionable under the FCA.”

Nursing home FCA actions are often settled with the government by SNF’s agreeing to pay millions of dollars for its liability. On June 16, 2016, the Department of Justice announced that Genesis HealthCare agreed to pay the government $53.6 million to settle its FCA claims for medically unnecessary therapy and hospice services. Its claims included submitting false claims to Medicare for reimbursement of hospice services provided to terminally ill patients that were not terminally ill and not eligible for the Medicare hospice benefit and assigning patients higher RUG levels than necessary. Similarly, a press release on July 17, 2017 by the Department of Justice revealed that an

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9 Robert Fabrikanet et. al., Health Care Fraud and Compliance § 10.02 (Law Journal Press, 2014).
10 Id.
11 Id.
12 Id.
13 Id.
14 Nahon, Saharovitch & Trotz, PLC, Medicare and Medicaid Fraud in Nursing Homes, NURSING HOME NEGLIGENCE LAWYER BLOG (March 28, 2017).
17 Id.
Ohio based Nursing Home and Rehabilitation centers, Foundations Health Solutions, Olympia Therapy Inc., and Tidia Hospice Care, Inc. agreed to pay the government $19.5 million to resolve its FCA claims for medically unnecessary rehabilitation therapy and hospice services billed to Medicare.\textsuperscript{18} Its claims included excessive therapy and hospice services provided to patients ineligible for Medicare benefits, among other claims.\textsuperscript{19} In both of these cases, as well as many other similar situations, the government alleged that SNFs base their decisions to overbill federal health care programs on profit rather than qualify of care.\textsuperscript{20}

It is believed that “Medicare payments to nursing homes are increasing for reasons unrelated to the condition or characteristics of patients.”\textsuperscript{21} Evidence suggests that nursing homes “exploit[] the system ‘to optimize revenues.’”\textsuperscript{22} Examples include Medicare beneficiaries receiving care before and after their nursing home stay, although records indicate that patients ask to discontinue their therapy.\textsuperscript{23} “It is disturbing when health care companies bill Medicare [] to care for vulnerable patients, but provide grossly substandard care and medically unnecessary services just to boost company profits,” Special Agent in Charge Steven J. Ryan of the Department of Health and Human Services, Office of Inspector General told the Justice Department when explaining the government’s efforts to halt Medicare fraud in nursing homes. \textsuperscript{24} Genesis Healthcare’s allegations also included “violating essential requirements that nursing homes are required to meet in order to participate in and receive reimbursements from government health care programs and fail[ing] to provide sufficient nursing staff to meet residents’ needs.”\textsuperscript{25}

**Inadequate Care at Nursing Homes.** Inadequate care is one factor that the government uses in its analysis when assessing whether nursing homes have committed health care fraud by overbilling federal health care...
programs. “If the nursing home provides inadequate care and submits a reimbursement claim for its residents, the nursing home is submitting a false claim in violation of the FCA.” It is believed that SNF’s provide inadequate services to increase profits. Inadequate services include understaffing, ordering fewer tests and supplies, and reducing referrals to specialists. Inadequate care in nursing homes often occurs when SNF’s are acquired by investors who cut costs. One skilled nursing facility, Habana Health Care, “was struggling when a group of large private investment firms purchased it and 48 other nursing homes.” When acquired by investors, the facility quickly cut costs to raise profits; it cut the number of registered nurses at facilities in half and cut the budget for supplies, activities, and other services. The investors were soon earning millions of dollars a year. “Residents at those nursing homes are worse off, on average, than they were under previous owners, according to an analysis by The New York Times of data collected by government agencies from 2000 to 2006.” These revenue raising influences are not responsible corporate behavior. Nursing homes are meant to care for vulnerable citizens. SNFs need to find legally responsible ways to increase profits in struggling facilities. Cutting costs and providing unnecessary services to increase reimbursements from Medicare is not the right way to do it. The government is working overtime to bring civil actions against healthcare providers who commit fraud.

**Tips to Increase SNF Profits.** It is not easy to increase profits in SNFs, but revenue increases are not easy for any business. Nevertheless, so-called

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27 *Id.* (holding the nursing home could not have provided substantial care to two patients who developed pressure sores and as a result died).
28 *Joel M. Androphy et al.*, * supra note 2.
29 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 See *Press Release, Department of Justice, National Health Care Fraud Takedown Results in Charges Against Over 412 Individuals Responsible for $1.3 Billion in Fraud Losses (July 13, 2017)*, https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-charges-against-over-412-individuals-responsible.
“get rich quick schemes” are not the legal or responsible way to increase profits in nursing homes. Nursing homes care for vulnerable patients and corporations owe a special social responsibility to those patients. Instead of taking advantage of the system, SNF’s should use simple business strategies to raise profits.

Pam McDonald, editor and writer with Senior Housing Forum, gave six essential tips for operating skilled nursing facilities successfully. The tips include keeping licenses in good standing, raising Centers for Medicare and Medicaid Services (“CMS”) star ratings with patient care, building connections with nearby hospital staff to increase census, spending money to make money, elevating the features of SNFs, and hiring the right staff. These are great tips. Business is about making money, and many businesses have successfully made money without defrauding the government and harming others. To highlight a few of McDonald’s tips, building connections with nearby hospital staff is a great marketing strategy because it will increase referrals, which increases customers and money. Successful businesses market effectively to bring in customers to increase profits. Businesses also make sure that their facilities are attractive to customers. Elevating the features of a SNF by spending money on modern features and technology and increasing therapy programs will definitely boost profitability of the facility; spending money to make money. Furthermore, great staff is essential to a successful business. Understaffing hurts SNF’s more than it is thought to help. Understaffing leads to fraud and fraud leads to millions of dollars of liability that SNFs must pay the government. If SNFs boost profits in the ways that most businesses do, it will be successful. SNF’s must also keep in mind that these facilities are meant to care for vulnerable patients. Profit driven illegal schemes are not going to help vulnerable patients or the facility. It is time for SNFs to take responsibility.

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36 Pam McDonald, 6 Essential Tips for Operating Nursing Facilities Successfully, SENIOR HOUSING FORUM (January 1, 2016 9:25 PM).
37 Id.
38 See id.
39 Id.
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