The Emergency Room—The Front Door to the Hospital (Fraud Schemes)?

By Pamela Coyle Brecht

Fraud related to hospital services – both inpatient and outpatient – has led to over $511 million in damages and hundreds of millions of dollars in False Claims Act (FCA) settlements over the past 15 years. The ER has been aptly called the "front door" to the hospital.[1] ER patients account for 70% of all hospital admissions.[2] It is no surprise that the ER is also the locus of lucrative fraud schemes. Many ER patients are also beneficiaries of government healthcare programs. In 2021, 58% of all ER patients were covered by Medicare or Medicaid.[3] This percentage does not include other government healthcare programs such as Tricare, Champus/VA, the federal employee health benefits program (FEHBP) or private payors. The ER is a place rife for opportunistic fraudsters to cause mischief at taxpayers' expense.

Medical Necessity

Fraud schemes focused on charging payors for medically unnecessary services have been the subject of FCA cases and DOJ settlements since at least 2000.[4] The government's settlement with Hospital Corporation of America (HCA) in 2003 was a landmark recovery for the DOJ. ER patients have long been (and continue to be) exploited for common schemes in healthcare fraud, over-admitting ER patients for lucrative in-patient stays,[5] billing for services not performed or billing for medically unnecessary services.

Anti-Kickback Violations

What is lesser known, but even more insidious, is the prevalence of Anti-Kickback Statute (AKS) or Stark Law violations that impact ER operations. Clearly, ER care, like every other type of medical care, is highly regulated and must comply with the AKS, Stark Laws, and the FCA. However, to understand the way hospitals and ER staffing companies have become more sophisticated in schemes to violate federal and state laws aimed at preventing fraud, waste, and abuse through emergency care, a brief primer on how emergency treatment is provided to patients is helpful.

How Hospitals Provide for ER Treatment

Hospitals operate the ER as a department of the hospital. The nurses, technicians, physical building, equipment, and supplies are all provided by the hospital. The medical care in the ER is rendered by an emergency physician group, made up of physicians or advanced practice clinicians ("APCs", including NPs or PAs). Hospitals rarely employ the physicians and APCs who actually provide the medical care in the ER. Instead, the hospital enters into exclusive contracts with emergency physician groups who provide 24/7 the medical care for all patients entering the hospital through the ER. Over the past two decades, these contracts have increasingly been held by large, national staffing companies who compete with community-based emergency groups for ER contracts with both national and more regional health systems.

Exclusive ER Contracts are Streams of Referrals by Hospitals to Contracted ER Groups

Once these ER contracts are in place between the hospital and the ER group, each patient who enters the hospital ER is referred by the hospital to the contracted ER physician group to provide medical care. The referral that takes place between the hospital and the ER group is physically demonstrable: the hospital nursing staff literally delivers the ER patient to a treating room to receive care by the contracted ER group with the exclusive right (by contract) to treat every ER patient who enters the hospital.

The federal AKS and similar statutes under state laws "prohibits the knowing and willful payment of 'remuneration' to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs (e.g., drugs, supplies, or health care services for Medicare or Medicaid patients)."[6] Hospital-based medical services like anesthesia, hospital medicine, cardiac catheterization, etc., have long been susceptible to liability under Stark laws, the AKS, and of course, the FCA. Emergency medicine is no different from these other hospital-based services in terms of the reach of the FCA, AKS, and Stark.

Tainted ER Patient Referrals that Violate the AKS Carry Significant FCA Liability

In 2019, the DOJ resolved both civil and criminal liability against one of the country's largest hospital companies based on the hospital system using ER contracts as inducements in violation of the AKS.[7] In that case, the hospital provider, Health Management Associates, Inc. (HMA), which was later absorbed by Community Health Systems, Inc. (CHS), used lucrative ER contracts to induce a large contract management group EmCare (later a part of Envision) to participate in a scheme to admit ER patients to HMA facilities for inpatient hospital care without regard to medical necessity.[8] In that case, the government's settlements with EmCare for $29.8 million[9] and with HMA for $260 million[10] was based on the fact that both referrals in this scheme (ER patients referred under exclusive ER contracts by the HMA hospital to Emcare physicians and patients referred by Emcare physicians to the HMA hospital for outpatient ER services and inpatient care) were tainted by AKS violations. HMA's non-prosecution agreement was based on detailed factual admissions, including the admission that the conspirators had used ER contracts in violation of the AKS. The

ER group had induced the hospital system to obtain or maintain the ER patient referrals by promising to cooperate in the hospital's fraud scheme to increase admissions without regard to medical necessity.

Fraud schemes that employ creative use of inducements to acquire exclusive ER contract referral streams are properly the focus of enforcement activities. Both parties to the ER contract, the hospital granting the ER contract and the ER group receiving the contract have been on the receiving end of DOJ scrutiny. Tainted referrals for ER care can lead to hundreds of millions of dollars in civil recoveries and criminal penalties paid by hospitals or ER providers to the DOJ.

Conclusion

ER patients enter the front door of the hospital more frequently than any other type of patient. The ER patient referral stream from the hospital leading to contracted ER groups is the largest referral relationship a hospital has by volume. Like any other type of patient care, this high-volume referral relationship between hospitals and ER groups is and should be scrutinized for compliance with the AKS, Stark laws, and, of course, the FCA. The proliferation of large contract management groups (often owned by private equity) in the emergency medical space has added a level of complexity and sophistication to government oversight of this significant area of healthcare.

PAMELA COYLE BRECHT is a partner at Pietragallo Gordon Alfano Bosick & Raspanti, LLP. Ms. Brecht serves as Chair of the firm's national Qui Tam/False Claims Act Practice Group. She is also experienced in white-collar criminal litigation, employment law, internal investigations, and complex health care litigation. Ms. Brecht has litigated many of the most complex False Claims Act cases filed in the United States. Her cases have included alleged fraud by a large multi-state Medicaid managed care contractor, FCA violations by three of the largest hospital corporations in the country, and dissecting complex financial relationships among healthcare providers including Stark and Anti-Kickback issues. She has also litigated cases involving hospital fraud, emergency room fraud, medical device allegations, Medicare Part C and Part D fraud, government contractor fraud, laboratory fraud, as well as all types of pharmaceutical fraud. One of the whistleblower matters that Ms. Brecht has worked on was recognized in 2018 by The National Law Journal as one of the "Top 100 Verdicts." The matter, Lutz v Health Diagnostics Laboratory, ranked as #39 on the list of highest verdicts throughout the nation for that year and came in at #2 for the highest verdicts coming out of Pennsylvania.

Endnotes

[1]A new front door -Expanding the hospital's reach with freestanding Eds: "A hospital's emergency department (ED) often is referred to as the facility's "front door" because of the large number of patients who arrive through that department." Available at https://www.hfmmagazine.com/articles/397-a-new-front-door.

[2]For-Profit Hospitals Admit at Higher Rates from Emergency Departments Than Nonprofit. Available at https://ldi.upenn.edu/our-work/research-updates/for-profit-hospitals-admit-at-higher-rates-from-emergency-departments-than-nonprofits/#:~:text=Admitting%20is%20Profitable,come%20from%20the%20emergency%20department.

[3]Emergency Department Visit Rates by Selected Characteristics: United States, 2021. Available at https://www.cdc.gov/nchs/products/databriefs/db478.htm

[4]HCA – The Healthcare Company & Subsidiaries to Pay $840 Million in Criminal Fines and Civil Damages - Largest Government Fraud Settlement in U.S. History. Available at https://www.justice.gov/archive/opa/pr/2000/December/696civcrm.htm

[5]New Report Indicates America's Largest Hospital Corporation, HCA Healthcare, May Have Ripped Off Nearly $2 Billion From Taxpayers Nationally, Over $44 Million In California Available at https://www.seiu-uhw.org/press/seiu-hca-investigation-unsafe-staffing-unnecessary-admissions

[6]The contracted ER physicians determine the care needed, i.e. tests or treatments or admission to the hospital. The hospital care ordered by the ER physicians is mostly within the hospital where the ED is located. The ER physician's act of ordering tests or other care for ER patients is also a "referral" to the hospital. This reality is confirmed by the language of the physician self-referral laws (Stark laws), which specifically list "outpatient services" (which include ED services, except when performed outside the United States) and recommendations for admission to the hospital ("inpatient services") in the definition of "designated health services under Stark. 42 CFR § 411.351.

[7]Hospital Chain Will Pay Over $260 Million to Resolve False Billing and Kickback Allegations; One Subsidiary Agrees to Plead Guilty. Available at https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-260-million-resolve-false-billing-and-kickback-allegations-one

[8]*Id.*

[9]EmCare, Inc. to Pay $29.8 Million To Resolve False Claims Act Allegations. Available at https://www.justice.gov/usao-wdnc/pr/emcare-inc-pay-298-million-resolve-false-claims-act-allegations

[10]Hospital Chain Will Pay Over $260 Million to Resolve False Billing and Kickback Allegations; One Subsidiary Agrees to Plead Guilty. Available at https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-260-million-resolve-false-billing-and-kickback-allegations-one