

DOJ Settlement Highlights False Claims Act Risk for Skilled Nursing Facilities

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DOJ Settlement Highlights False Claims Act Risk for Skilled Nursing Facilities

Written by James P. Holloway – 10/2018

The Department of Justice (DOJ) recently announced a \$10 million settlement in a False Claims Act (FCA) qui tam lawsuit against Southern SNF Management, Inc. (Southern) and related skilled nursing facilities. The lawsuit alleged that the defendants implemented a company-wide policy of intentionally assigning residents to the "Ultra High" therapy level, without regard to the individual medical condition of each resident, in order to inflate resident RUG scores and thereby obtain excessive Medicare Part A and Tricare reimbursement. The settlement highlights the need for skilled nursing facilities (SNFs) to monitor whether they are providing the appropriate level of therapy services to residents.

The Allegations

In the *Southern* case, the settlement avoided a trial on detailed allegations that the defendants had presented knowingly false claims:

- Newly admitted Medicare Part A residents allegedly received physical therapy, speech therapy and occupational therapy on a daily basis until Medicare Part A coverage was exhausted, even if all three therapies were not medically indicated.
- After a resident reached his or her 100-day Medicare Part A stay and converted to Medicaid, the facilities allegedly

discharged residents as soon as possible to avoid continuing therapy services.

- The facilities allegedly were instructed to maintain at least 70 percent of Medicare Part A residents at the Ultra High therapy level.
- The facilities allegedly altered resident medical records to reflect that residents received more therapy minutes than were actually provided.
- Residents allegedly were given at least 720 minutes per week of therapy services to qualify for the Ultra High therapy level, but after reaching that threshold needed to qualify for maximum reimbursement, therapy services would be curtailed.
- Therapists allegedly were given gift cards if they provided residents with the pre-planned amount of therapy minutes.
- The facilities allegedly knew their payment claims were false because the OIG's [Supplemental Compliance Program Guidance for Nursing Facilities](#) warned providers about excessive therapy services to inflate Medicare reimbursement.

The False Claims Act

The FCA imposes liability for submitting knowingly false payment requests to federally funded programs or making knowingly false records or statements material to a false claim. Providers that violate the FCA are liable for three times the amount of the government's overpayment, plus a penalty of up to \$22,363¹ for each false claim, as well as attorneys' fees and other litigation costs. In many cases, the potential financial exposure is so catastrophic that some providers perceive great pressure to settle a lawsuit, even if the allegation of false claims is weak. Settlements typically involve a substantial

payment to the DOJ and the acceptance of a corporate integrity agreement with the OIG, which may result in significant administrative costs.

Under the FCA, a provider is liable for submitting knowingly false claims to federally funded programs, but the law defines *knowingly* to include actual knowledge that a payment request is false, and "deliberate ignorance" or "reckless disregard" for the truth or falsity of a payment request. In other words, a provider may find itself being sued if it allegedly knew or should have known that a payment request was false. Given that reality, it is imperative that nursing facilities proactively monitor the intensity and duration of therapy services to assure such services are consistent with the medical conditions and functional status of their residents.

Are You Monitoring Your Therapy Services?

In many instances, the Ultra High therapy level is completely appropriate for SNF residents, especially to facilitate a shorter length of stay and earlier discharge to home. Thus, the *Southern* settlement should not be interpreted as a mandate to avoid the Ultra High designation. Rather, the takeaway for SNFs is to be aware of therapy utilization, understand how it compares to utilization by their peers, and if they are an outlier with respect to the use of the Ultra High therapy level, assure that there is a clinical justification. The government actively uses data mining to identify outlier providers that may be engaged in fraudulent billing practices. In the case of *Southern*, Southern's use of the Ultra High therapy level was allegedly much higher than that of its peers, which attracted the government's attention. Furthermore, the medical necessity was questioned when its nursing facilities maintained many residents at the Ultra High therapy level throughout the full 100 days of the Medicare

Part A stay, followed by a curtailment of therapy services after Medicare Part A coverage was exhausted.

SNFs should access [PEPPER reports](#), [Nursing Home Compare](#), and [Skilled Nursing Facility Utilization and Payment Public Use File](#) data to evaluate how they compare to other nursing facilities in their state, MAC jurisdiction, and nationally. PEPPER reports include, for example, data indicating the average number of days for which SNF residents had RUG scores associated with Ultra High therapy levels. And the Medicare Provider Aggregate Table in the Skilled Nursing Facility Utilization and Payment Public Use File includes information on nursing facility lengths of stay. Being an outlier does not by itself demonstrate fraudulent conduct. However, an outlier facility is more likely to be scrutinized by the government and, therefore, such facilities should evaluate whether their RUG scores based on therapy levels and lengths of stay are clinically appropriate for their residents. A SNF that is armed with data and documentation validating the Ultra High therapy level for its residents is in a position to fight allegations of fraudulent billing and avoid being pressured into an unfavorable settlement.

How to Perform an Internal Review

Nursing facilities should think carefully about performing an internal review alone. Will the results of your review be protected by privileges? Do you have the clinical and billing expertise to perform the review effectively? Facilities should consult with legal counsel regarding the potential application of legal privileges to protect the results of their internal review of therapy services. In addition, facilities should utilize outside consultants who have clinical expertise with physical, occupational and speech therapy. It is important to use a consultant who has the credentials, experience, objectivity and

credibility with government regulators in the event the facility later makes a strategic decision to disclose its audit results to refute allegations of inappropriate therapy services.

It would be a mistake for a nursing facility to avoid a critical evaluation of its therapy services based on its history of past claims audits and success on appeals. The number of Medicare contractors conducting data analysis, investigations, and audits is increasing. Such scrutiny could expose a nursing facility to potential false claims allegations involving therapy services. Furthermore, facility employees seeking to recover large bounties under the FCA may file qui tam lawsuits alleging that inappropriate therapy services resulted in false claims to government health care programs. In the *Southern* case, employees received a \$2 million payment as part of the settlement. Such settlements will clearly incentivize employees at other nursing facilities to file similar lawsuits.

Takeaways for Skilled Nursing Facilities

- Monitor your therapy services.
- Utilize clinical and billing experts to assure the validity of therapy services and/or to promptly identify and correct problems.
- Establish legal privileges to protect the results of your internal review.
- Nursing facilities that neglect to take a hard look at their therapy services do so at their own peril.

For assistance with assessing FCA risk at your facility, please contact the author, [James P. Holloway](#), or any member of Baker Donelson's [Government Enforcement and Investigations Group](#).

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