

Healthcare Trend: Physicians on the Hook for False Claims Act Settlements

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrate the wrongdoing.” So said a memorandum penned in 2015 by Sally Yates, then U.S. Deputy Attorney General. The seven-page Yates memo goes on to urge False Claims Act (FCA) investigations to train the spotlight on the individuals who may be committing fraud, rather than allowing them to hide behind corporations.

In 2015, a mere half-dozen physicians were required to personally pay to settle FCA cases. However, so far in 2017, more than two dozen doctors have had to make settlement payments using their own funds (this according to analyst Eric Topor of Bloomberg BNA and reported by the *National Law Review*). It may very well be that the Yates memo has been taken seriously by those investigating cases of fraud in healthcare, and that it reflects an ongoing pattern.

“Individual accountability” a point of agreement for Deputy Attorneys General

Although he hasn't overtly promised to do so, current Deputy Attorney General Rod Rosenstein has reportedly entertained plans to fold the rationale that fuels the Yates memo into the official manual for U.S. Attorneys. And whether or not he takes that step, he seemingly agrees with identifying the wrongdoer and holding him/her/it responsible for the wrongdoing, whether on the individual level and/or the corporate level.

Rosenstein delivered the keynote address for the U.S. Chamber Institute for Legal Reform in October and said, “We are establishing a Working Group on Corporate Enforcement and Accountability, which will offer recommendations on promoting individual accountability and corporate cooperation.”

Regarding healthcare professionals who may be intending to hide behind a large healthcare machine in order to escape notice from fraud investigators, Topor's analysis shows that physicians employed by sizable hospitals are less likely to be the individuals on the FCA hook than doctors who own their own practices. The reason for this, of course, is that typically doctors working in hospitals have more distance between them and the facility's billing practices.

Even doctors in large hospitals not immune to fraud investigation

Still, the Yates memo is clear in its urging for the government to pursue action against individual physicians when they are accused of fraudulent billing practices, no matter how large the provider umbrella under which they work. Topor's research reveals that when a doctor is individually named as a bad actor in FCA litigation, the odds are that the government itself will try to collect a personal settlement from the physician, as will the whistleblower in a *qui tam* case.

So if anything, this personal settlement trend should motivate doctors — who might have assumed that working for large hospitals makes them immune to billing fraud investigations — to proceed with caution.

And even when a false claims investigation appears to be wrapping up at the corporate level, often settlement clauses are in place that permit the scrutiny to carry on; and furthermore, those clauses often stipulate that doctors must cooperate with any investigations. Sometimes these clauses can spell additional settlements down the road, with physicians as the focus.

The DOJ “will not flag in its commitment” to uncovering fraud

Truly, the work that goes into combatting healthcare fraud is effort that the government sees as ongoing. Acknowledging that



there is no one way to prevent fraudulent behavior in every instance, Rosenstein said in his address that “no measures will be successful in deterring all criminals.”

But he followed that up with the Department of Justice’s determination to continue the fight against fraudulent activity overall and regardless of wrongdoer specifics. “This is why the Department will not flag in its commitment to investigating and pursuing corporate fraud, whether American companies are victims, or perpetrators.”

This article is provided for educational purposes only and is not offered as, and should not be relied on as, legal advice. Any individual or entity reading this information should consult an attorney for their particular situation. For more information/questions regarding any legal matters, please email info@nelsonhardiman.com or call 310.203.2800.