Sometimes a Mistake is Just a Mistake: Bill Introduced in the House of Representatives to Push Back Against Aggressive Department of Justice Health Care False Claims Investigations

Aaron M. Danzig

In recent years, the Department of Justice (DOJ), the Department of Health and Human Services (HHS), Office of the Inspector General and other state and federal agencies have increasingly and aggressively investigated health care providers for violations of the False Claims Act. Seemingly on a weekly, if not daily, basis, the government is touting another settlement in a False Claims Act investigation where the provider, be it a hospital, physician's practice, or other provider, agrees to pay hundreds of thousands or millions of dollars to settle a case. Over the past four years, the DOJ has touted recoveries of over $14 billion in False Claims Act cases. As health care providers are all too aware, the penalties in a False Claims Act case can be astronomical – up to treble damages plus $5,000 -- $11,500 per false claim. On top of that, there is the risk of exclusion proceedings. While there is no dispute that there are real instances of health care fraud and abuse out there, and that the government should vigorously investigate such matters, because of the severe direct and ancillary penalties associated with False Claims Act investigations, most health care providers that find themselves in the crosshairs of a government investigation are unwilling to risk a trial and instead settle such claims - generally with a monetary payment, and often with a Corporate Integrity Agreement.

However, help may be on the way to level the playing field, at least a little bit. In a rare show of bipartisanship, two members of the U.S. House of Representatives (Republican Howard Coble of N.C. and Democrat David Scott of Georgia) introduced the "Fairness in Health Care Claims, Guidance, and Investigations Act" (H.R. 2931) on August 1, 2013. According to Representative Coble, "[t]he tension between the medical profession and federal investigators has never been higher." One concern is the view that billing mistakes can happen, especially with the complex, confusing and sometimes conflicting government regulations covering federal health care programs. These billing mistakes, however, do not necessarily mean that fraud occurred. The sponsors hope the proposed bill will ease the tension between providers and federal regulators, thereby "allow[ing] hospitals [and other providers] to concentrate on patients and not confusing and duplicative regulations."

The proposed bill has three major provisions. First, the bill requires that, before requesting any information from a physician, hospital, or other health care supplier in connection with an investigation involving 10 or more claims submitted to a federal health care program, the Attorney General must certify that the responsible federal agencies have reviewed their own rules and regulations to determine whether such rules and regulations were unambiguous and support even launching an investigation. Second, the bill includes a "de minimus" threshold, requiring that the amount of damages allegedly sustained by the government be of a material amount. Third, the bill provides a safe harbor prohibiting False Claims Act cases where the provider acted in good faith reliance on written statements or audits by federal agencies or contractors, or if the provider has implemented a model compliance program. Finally, the bill would raise the burden of proof in False Claims Act cases. The American Hospital Association sent a letter of support to Representative Coble stating, "[w]e applaud your effort to ensure that unintentional billing disputes are not pursued and penalized as fraud."

Certainly there is a need for federal enforcement agencies to investigate and deter health care fraud. However, sometimes a mistake is just a mistake.

Authors and Contributors

Aaron M. Danzig
Partner, Atlanta Office
404.873.8504
aaron.danzig@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with 160 attorneys in Atlanta, Washington, DC and Miami, employs a "business sensibility" approach, developing a deep understanding of each client's industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal's prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief "not if, but how.®" Visit www.agg.com.

Atlanta Office
171 17th Street NW
Suite 2100
Atlanta, GA 30363

Miami Office
Two South Biscayne Boulevard
One Biscayne Tower 2690
Miami, FL 33131

Washington, DC Office
1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**