Eli's Hospice Insider

COMPLIANCE: 4 Strategies Protect Your Hospice From Whistleblower Suits

Arkansas hospice slapped with qui tam suit filed by competitor.

You may think you've got all the bases covered in heading off whistleblower lawsuits, but don't let the opposing team blindside you with allegations of fraud and abuse.

Little Rock, Ark.-based for-profit Hospice Home Care Inc. (HHC) is learning that lesson the hard way, thanks to a qui tam suit filed by nonprofit competitor Arkansas Hospice Inc., also of Little Rock. Arkansas Hospice filed the qui tam complaint in 2004, but the suit was just joined by the government and recently unsealed in federal court.

In the original qui tam filing obtained by **Eli,** Arkansas Hospice alleges that HHC billed for patients who resided in nursing homes at the general inpatient (GIP) level when they really only qualified for -- and HHC only furnished -- routine hospice care. HHC used the GIP billing to tell patients and referral sources that the patients wouldn't have to pay for their nursing home costs, because room and board would be covered under the GIP payment.

Background: In 2004, Medicare paid about $500 a day for GIP while routine hospice care was reimbursed at about $125 per day, Arkansas U.S. Attorney **Jane Duke** points out in a press release.

So far, government prosecutors have reviewed records for 34 patients and found 257 allegedly false claims totaling $1.4 million in overpayments for unnecessary and unprovided GIP, Duke says.

After families of HHC patients told Arkansas Hospice about their concerns, the hospice spent about $25,000 to $30,000 investigating the matter before filing a lawsuit, CEO **Michael Aureli** told the Arkansas Business newspaper.

The bad press from the lawsuit will probably hurt the Arkansas hospice industry overall, Aureli told the newspaper. But the hospice felt it had an obligation to file the suit.

Don't discount the threat:

Competitors aren't the first place home care providers suspect potential whistleblowers to come from. "Many providers focus on employees -- especially disgruntled former employees -- as the source of quitam suits," cautions Washington, D.C.-based health care attorney

Elizabeth Hogue.

But competitor-driven lawsuits are more common than some providers realize, notes attorney **Joel Hamme** with Powers Pyles Sutter & Verville in Washington, D.C. "I would suspect that competitors are the second- or third-biggest source of qui tam actions after employees and perhaps consumers," Hamme tells **Eli.** "After all, employees, competitors, and consumers are the ones most likely to know of and have familiarity with a provider's services and practices."

The reason there aren't more competitor-filed qui tam suits is probably because providers don't like the idea of getting their hands dirty in a prolonged whistleblower case, says attorney **Robert Markette Jr.** with Gilliland & Markette in Indianapolis.

Many providers prefer to report their concerns to authorities such as a state Medicare fraud unit or the HHS Office of Inspector General and move on, he notes.

Competitors also usually want the prohibited practice to stop hurting their own business, but they aren't as interested in

gaining financially from a lawsuit as individual relators are, Markette believes. And they often hope for a quicker resolution from enforcement versus litigious means, since whistleblower suits can drag on for years.

Try this: Often the quickest route to resolution can be contacting the offending party directly, Hogue advises clients. Letting them know that you're aware of their behavior and explaining why it is wrong can sometimes stop it in its tracks.

Competitors also usually lack the specific claims knowledge that former employees use to file qui tam suits. Instead, they hear about the provider's relationships with referral sources and have grounds for anti-kickback statute charges, Markette adds.

Ward Off Qui Tam Actions

To protect yourself against whistleblower lawsuits originating with your competitors, follow this expert advice:

1. Perform a self-evaluation for

compliance. Competitor whistleblower suits generally get filed because aprovider is performing some improper action that is hurting the competitor's business, Hamme points out. Thus, smart providers will "examine any and all areas that give them a real or potential competitive or financial advantage over others in the same market area," he recommends. Then they should "ascertain that any such advantage is legitimate and reasonable."

Bonus: This can help you assessyour marketing efforts as well, he adds. To determine legitimacy, ask yourself questions like whether higher levels of care are necessary and whether that necessity is documented, he says.

2. Take competitor reports seriously.

If you receive a call from a competitor calling you out on a certain practice, your first impulse may be to tell them off. But you should take the call seriously and respond appropriately to head off fraud reports to authorities or whistleblower suits like this one, Hogue cautions.

You should promise to investigate the alleged impropriety and get back to the caller with the truth, Hogue advises. Or, if you know the practice to be lawful, you can explain why it is so.

Hogue encourages clients to avoid bad press and take their concerns directly to the affected parties. "When providers engage in fraud, it hurts everyone in the industry," Hogue tells **Eli.** Especially in this environment of health care reform and looming funding cuts, "Congress and regulators are looking for any excuse to slash funding."

3. Stand up to improper practices.

In today's competitive environment, providers are tempted to follow another provider's example when a referral source such as a physician or nursing home tells them "everyone's doing it." "You should be strong enough to say 'no,'" Markette exhorts. For example, just because another hospice is paying a nursing home more than fair market value for room and board doesn't mean it's OK for you to do it, too. The short-term gains aren't worth the long-term consequences, Markette warns. "You're going to get caught." Upset competitors will turn to the authorities or the courts for justice. Under the False Claims Act, you could wind up paying $1 million for $100,000 worth of claims due to restitution, penalties assessed per claim, and treble-damage levels. "A conspiracy only works when everyone's happy," Markette stresses. When you have a competitive advantage over another provider due to questionable practices, that entity isn't happy.

4. Don't forget your compliance

plan. You should codify your whistleblower-prevention practices in your compliance plan, Markette advises.

Also include how you will respond when you learn of other providers' improper practices.

Codify
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