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HEALTHCARE NOTES
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FEDERAL GOVERNMENT SUES ERNST & YOUNG UNDER FALSE CLAIMS ACT

For those who believe the federal False Claims Act is used solely by disgruntled employees or competitors in whistleblower actions, known as *qui tam* actions, they may want to think again. In early January, 2004, the U.S. Attorney's Office in Pennsylvania sued Ernst & Young, L.L.P. under the False Claims Act, alleging that Ernst & Young, through the giving of advice, "caused" the submission by nine hospitals of over 200,000 claims for payment to the Medicare program to which these hospitals were not entitled. The actual damages claimed by the government are $900,000.00. Under the False Claims Act, damages may be tripled, and for the time period identified in the complaint, each false claim may be assessed a penalty of $5,000.00 to $10,000.00.

Under the False Claims Act, liability can attach for knowingly submitting **or causing to be submitted** false claims. The government must prove that the defendant's conduct was "knowing" as that term is defined by the Act. Actual knowledge does not have to be proved. "Knowing" is defined as any of the following: actual knowledge of falsity; reckless disregard for whether information is true or false; or deliberate ignorance of whether information is true or false. The Pennsylvania complaint alleges that Ernst & Young kept itself ignorant of the truth or falsity of its advice because it allegedly failed to take steps, such as utilizing sampling protocols, making appropriate inquires, or having proper audit protocols in place, in concert with the work it performed for the hospitals.

The government claims that for the period 1991 through 1997, the hospitals in question operated directly, or contracted for the operation of, outpatient clinical laboratories that performed blood tests on numerous patients, including Medicare beneficiaries. The complaint claims that when routine CBCs (complete blood counts) were performed in the hospitals' laboratories per physician orders, the equipment that was used generated, or had the potential to generate, additional medical data, or "indices", that provided additional blood screening information. The complaint states that Ernst & Young recommended that the hospitals bill for the additional indices even though the additional information was not "reasonable and necessary for the diagnosis and treatment of an illness or injury" (which is the standard for reimbursement by the Medicare Program), because the indices were not ordered by a physician. The government claims that because Ernst & Young consultants were hired as experts, they knew how a hospital billing system worked and knew the consequences of their advice.

The complaint alleges that Ernst & Young made recommendations for the hospitals to achieve "optimization of outpatient reimbursement", such as seeking additional reimbursement only from "fee scheduled-based payors", but not charge-based payors, which would result in additional billing to Medicare, but not to private insurers. The government claims that Ernst & Young advised certain hospitals to reduce their charge for the CBC by the amount of the charge assigned

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to the additional indices "in order to maintain the total charge", which allegedly would increase the total reimbursement from Medicare. In some instances, Ernst & Young allegedly recommended that a hospital start routinely billing for additional indices whenever a blood cell profile was performed. The government claims Ernst and Young recommended that codes for the additional indices should be "linked" with the blood cell profile code so that charges would automatically increase each time a blood cell profile was ordered by a physician.

Other allegations relate to a government investigation of certain individuals who had entered consulting contracts with more than 200 hospitals. As a result of the investigation, the federal government provided each hospital a summary of its concerns and an opportunity to meet to discuss potentially inappropriate billings. The complaint describes a meeting that occurred on July 6, 1995, which was attended by representatives of a variety of hospitals. The complaint states that Ernst & Young attended as a representative of five hospitals named in the complaint. The government asked each hospital to review its laboratory billing in light of concerns raised and to apply a particular sample work plan the government provided. The government offered to allow the hospitals to obtain a report from an outside advisor, or they could have a review conducted by the OIG. The complaint alleges that Ernst & Young, acting as an outside professional advisor, reported on five hospitals named in the complaint.

The government claims that the Ernst & Young reports were misleading as to the extent of improper billing and the hospitals' involvement in it. It alleges that Ernst & Young knew or recklessly disregarded the fact that the reports would mislead the United States. The complaint identifies, by hospital, allegedly misleading information, such as "intentionally" failing to include information about a particular hospital's billing for additional indices when Ernst & Young allegedly knew that the hospital was doing so at the time; that Ernst & Young never recommended a hospital should make a refund to the Medicare program of improper billings for additional indices that were not medically necessary; and that Ernst & Young provided a list of tests (including additional indices) that "would be approved by Medicare".

The government's allegations are serious and place Ernst & Young in a position of having to defend against claims that, if successful, could result in vast recovery. This lawsuit is aggressive in that it moves a step away from action against any health care providers for allegedly submitting false claims to the government. Instead, it alleges that a consultant **caused** the hospitals to submit false claims.

A federal court complaint tells only one side of the story. Ernst & Young's response likely will tell a different side. Nevertheless, this is the type of case that deserves watching. Regardless of the outcome of the matter, any rulings that might become law could have some effect on those who perform consulting work in complex, highly-regulated, ever-changing environments such as health care.

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